[2021] JMCA Crim 51

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

SUPREME COURT CRIMINAL APPEAL NOS 36 & 43/2016

BERTRAM CLARKE
ARTHUR ROBINSON v R

Miss Gillian Burgess for the appellant Bertram Clarke

Leroy Equiano for the appellant Arthur Robinson

Miss Kathy-Ann Pyke and Dwayne Green for the Crown

1, 9 December 2020 and 17 December 2021

DUNBAR-GREEN JA (AG)

Introduction

[1] On the night of 26 October 2007, 74-year-old Floris Clarke ('Mrs Clarke') was attacked in her home. Mr Bertram Clarke ('Mr Clarke'), her husband, purportedly found her bleeding in their living room. She was subsequently taken to the Saint Ann's Bay Hospital and later transferred to the Kingston Public Hospital ('KPH'), where she died on 27 October 2007. She succumbed to haemorrhage due to blunt force injury to the head.

[2] On 25 March 2016, Messrs Bertram Clarke and Arthur Robinson ('the appellants') were convicted in the Home Circuit Court for the murder of Mrs Clarke, and on 29 April 2016, Mr Clarke was sentenced to life imprisonment at hard labour with eligibility for

parole after 25 years, and Mr Arthur Robinson ('Mr Robinson') to life imprisonment with eligibility for parole after 21 years.

[3] Mr Robinson was granted leave, by a single judge of this court, to appeal his conviction. However, Mr Clarke's application for leave to appeal against conviction and sentence was refused by the single judge and so he renewed his application before this court.

Factual background

[4] It was the prosecution's case that Mrs Clarke was killed by Mr Robinson, who was then 15 years old, and Emmanuel Newland ('Mr Newland'), who was also a minor at the time. This was, allegedly, pursuant to a murder pact with Mr Clarke, who procured the killing because the relationship with his wife had broken down, and he wanted to occupy the matrimonial house with his mistress with whom he had two children.

[5] Relatives and acquaintances of Mrs Clarke gave evidence at the trial of unflattering, suspicious and accusatory observations that they had made in relation to Mr Clarke's conduct generally, and after Mrs Clarke was injured. At its core, their evidence was that he had neglected Mrs Clarke; he had delayed seeking immediate help and medical care for her; that while she was being treated at the hospital, his main concern was whether she would be able to talk; he had insisted on returning home instead of accompanying her to the KPH; and he gave different explanations for how she might have sustained the injuries which led to her death. There was also evidence that Mrs Clarke had told him to leave the family home the very week of the killing.

[6] None of those witnesses, called by the prosecution, gave direct evidence of any pact among Messrs Robinson, Newland and Clarke. If anything, their evidence was purely circumstantial. Direct evidence of a pact was expected to come from Mr Newland, who had pleaded guilty to the murder of Mrs Clarke and turned prosecution witness. But, Mr

Newland became a hostile witness and denied the contents of the two statements in which he purportedly implicated Messrs Clarke and Robinson.

[7] In the end, considerable reliance was placed on a written caution statement and other out of court statements in which Mr Robinson claimed that it was Mr Clarke who had sent him and Mr Newland to kill Mrs Clarke and burgle the house. However, Mr Robinson repudiated the caution statement in an unsworn statement from the dock and said he knew nothing about the killing of Mrs Clarke.

[8] He explained, in his unsworn statement, that he was at Mrs Clarke's residence (along with Mr Newland) in the evening of 26 October 2007 (the date Mrs Clarke was injured), at the request of Mr Clarke, to assist him with removing some gas cylinders from his (Mr Clarke's) vehicle. Whilst awaiting some money from Mr Clarke, he overheard an argument between Mr and Mrs Clarke, followed by a smashing sound. Mr Clarke then emerged from the house with some items, including a baton, which he gave him to dispose of in a pit toilet at the Watt Town All Age school. He refused, and Mr Clarke "draped him up", pushed a sharp object in his side, and threatened to kill his family if he did not dispose of the items. He took the items from Mr Clarke and disposed of them in a pit toilet at the Watt Town All Age School.

[9] Mr Robinson further said he was forced and threatened into giving a caution statement to the police confessing to the murder. This statement was given in the absence of his parents or an attorney-at-law. A justice of the peace, Mr Redway ('JP'), and a teacher, Mr Gregory ('teacher'), witnessed the making of the caution statement. Mr Robinson was later taken and lowered, by rope, multiple times into the pit toilet at the Watt Town All Age School, where he retrieved and handed over to the police an item resembling a bat, an implement resembling a penknife, and other material.

[10] For his part, Mr Clarke gave evidence, at the trial, in which he denied any involvement in the death of his wife. He said he was not even home when the attack on

his wife took place and that he went home on the eventful evening and found his wife injured. He denied ever being told by Mrs Clarke to leave the family house. As far as he knew, he and his deceased wife had shared a good relationship.

[11] He said he did not know Mr Newland, and did not meet with Messrs Newland and Robinson in October 2007. Neither did he make any promise to pay either of them to kill his wife, as alleged by the prosecution. He explained that on the night of the incident, he went home at 11:00 pm and saw his wife on the floor with a huge bump on her forehead. He saw that she was bleeding from the nose and ears and he thought she had fallen and hit her head on the rails. He wiped her nose and ears with a wet rag and tried to raise her up but could not. He did not realize that she had stab wounds until her clothing was removed at the hospital and blood spewed out. At the hospital, he had asked whether his wife would have been able to talk because he wished to know who had attacked her. He also said he had told family members at the hospital that he needed to go home to retrieve medication and clothes for his wife, and that he also needed to change his clothes which were blood-stained.

The appeal

Bertram Clarke

[12] With the leave of this court, Mr Clarke abandoned his original grounds of appeal and argued, instead, the following supplemental grounds of appeal, filed on 17 November 2020:

> "1. The applicant's trial was unfair in that 'evidence' against him emanated from his co-defendant Arthur Robinson who he was not permitted to cross examine;
>
> 2. That the learned trial judge misdirected the jury when she failed to give them directions on how to treat the hearsay contained in the various out of court statements of Arthur Robinson with respect to the applicant; [and]

3. That the learned trial judge erred in law when she failed to give a warning that it was dangerous to convict on the uncorroborated evidence of the alleged accomplices which rendered the trial unfair."

Ground 1 – The applicant's trial was unfair in that 'evidence' against him emanated from his co-defendant, Arthur Robinson, who he was not permitted to cross examine

[13] Miss Burgess, counsel for Mr Clarke, submitted that the general rule at common law is that an out of court admission of an accused is evidence against the maker of the admission only and not against any other person implicated by it unless the other person adopts the statement. This rule, she indicated, is "distinct from cases where the co-accused gives evidence from the witness box in the course of the trial in which case it becomes evidence for all intents and purposes".

[14] This general rule, counsel argued, was violated by Mr Robinson's unsworn statement from the dock, in which he contended that Mr Clarke had threatened him with death if he did not dispose of implements which were later discovered to be connected to the murder of Mrs Clarke. Counsel submitted that although the learned trial judge was alert to the fact that this was a case of a co-accused making an unsworn statement against another co-accused, on which he could not be cross-examined, she failed to properly direct the jury when she told them that they could rely on the unsworn statement and make what they would of it. In so doing, counsel submitted, the learned trial judge misdirected the jury as to the value of Mr Robinson's unsworn statement.

[15] Counsel pointed to pages 3774 – 3775 of the transcript where the learned trial judge said:

> "Now, Mr. Arthur Robinson gave an unsworn statement from the dock, which tended to show that the defendant, Mr. Bertram Clarke, was involved in the commission of the offence which you are trying. Examine what he has told you with particular care, for Mr. Arthur Robinson is saying the things he said – I am sorry, you must examine what he has told you with particular care, for Mr. Arthur Robinson, in saying the

> things he said, may have been more concerned about protecting himself than about speaking the truth. Bear in mind, when deciding whether you can believe what Mr. Arthur Robinson has told you about Mr. Bertram Clarke. Additionally, he did not give any evidence on oath, he gave an unsworn statement, which was not subjected to cross-examination. You should therefore consider the content of his unsworn statement especially as it relates to his co-defendant Mr. Clarke, and determine whether his unsworn statement has any value and, if so, what weight you should attach to it. Remember that an unsworn statement was not tested by cross-examination and has less cogency and weight than sworn evidence. Bear in mind also that Mr. Bertram Clarke, in contrast went into the witness box and gave evidence on oath and was tested in cross-examination."

[16] Counsel suggested that the correct direction to the jury should have been that the unsworn statement was not evidence against Mr Clarke but evidence against Mr Robinson only. She sought support from section 16(6)(d) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ('the Charter'), which entitles every person charged with a criminal offence, "…to examine or have examined, at his trial, witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

[17] Miss Pyke, on behalf of the Crown, submitted that even where an accused implicated his co-accused in an unsworn statement, that did not make the trial unfair for the implicated accused. The critical determinant for a fair trial would be the direction to the jury on how it should assess the content of an unsworn statement. In doing so, a trial judge must not negate the unsworn statement by saying that it is of an inferior quality to sworn evidence or that it is not sworn evidence, and the defence of the maker of the statement must not be watered down or negated by any direction that tends to inspire the jury to disregard the content of the unsworn statement.

[18] Relying on the Privy Council decision of **Director of Public Prosecutions v Leary Walker** [1974] 21 WIR 406 ('**DPP v Walker**'), Miss Pyke submitted that the jury

must be told that the unsworn statement is material in the case and it is for them to decide what weight, if any, they would give to it. She also referenced the decision of the Court of Appeal of Belize in **Jason Bruce Lawrence v R** (unreported), Court of Appeal, Belize, Criminal Appeal No 12 of 2014, judgment delivered 22 June 2018 (which relied on **Alvin Dennison v R** [2014] JMCA Crim 7). In that case, the court examined the authorities and pointed out, at para. 51, the four elements of the "**DPP v Walker** direction" which must be in the direction to the jury:

i. it was exclusively for the jury to make up their minds as to whether the dock statement had any value;

ii. if it had value, what weight should be attached to it;

iii. whether the evidence for the prosecution satisfied them of the accused's guilt beyond a reasonable doubt; and

iv. they should give the dock statement only such weight as they may think it deserves.

[19] Citing the authorities of **Marcutulio Ibanez v R** (1998) 53 WIR 83 ('**Ibanez**'), **R v Coughlan** (1977) 64 Cr App Rep 11, and **R v George** (1980) 68 Cr App Rep 210, Miss Pyke conceded that it was incumbent on the learned trial judge to have directed the jury that they could not use the unsworn statement of Mr Robinson as evidence against Mr Clarke. She also acknowledged that it was the duty of the learned trial judge to instruct the jury on the status, value and content of the unsworn statement in a manner and form which was clear, coherent and balanced in respect of both Mr Clarke and Mr Robinson.

[20] Counsel pointed to the aspect of Mr Robinson's defence where he sought to explain possession and disposal of the bat and other items, and suggested that this evidence would have nullified Mr Clarke's alibi by putting him at the home of Mrs Clarke while she was alive and talking. Mr Clarke would have been further implicated by Mr Robinson's

account of an altercation between Mr Clarke and Mrs Clarke, and the "smashing" sound which Mr Robinson said he heard, followed by the threat, under which, he was allegedly given the items to throw away.

[21] She highlighted various aspects of the learned trial judge's summation and submitted that, taken as a whole, the summation and directions to the jury were a careful and reasoned attempt at being balanced and fair, but for the fact that the unsworn statement was not correctly placed before the jury in so far as Mr Clarke's case was concerned. Counsel pointed out that this case was different from one in which both accused gave sworn testimony against each other or against another co-accused, for example in **R v Singh** (1963) 5 WIR 61, and **Shanice Rolle v R** (unreported), Court of Appeal, Commonwealth of the Bahamas, SCCrApp No 107 of 2014, judgment delivered 29 September 2016.

[22] Counsel accepted that the learned trial judge ought to have told the jury that they could not use the unsworn statement against Mr Clarke though it was proper for them to consider the unsworn statement insofar as Mr Robinson's defence was concerned. This should have been combined with an explicit direction to the jury that they were to look only at the prosecution's case to see if Mr Clarke was guilty.

[23] Having considered the submissions of both counsel, we believe the starting point is to recognize that, in this jurisdiction, it is still the law that every accused person in a criminal trial has the right to make an unsworn statement. The exposition of Morrison P in **Alvin Dennison v R**, at paras. [49] to [51], affirms the status of the unsworn statement:

> "[49] In a variety of circumstances, over a span of many years, the guidance provided by the Board in ***DPP v Walker***, which also reflected, as ***R v Frost & Hale*** confirms, the English position up to the time of the abolition of the unsworn statement, has been a constant through all the cases. It continues to provide authoritative guidance to trial judges for

the direction of the jury in cases in which the defendant, in preference to remaining silent or giving evidence from the witness box, exercises his right to make an unsworn statement. It is unhelpful and unnecessary for the jury to be told that the unsworn statement is not evidence. While the judge is fully entitled to remind the jury that the defendant's unsworn statement has not been tested by cross-examination, the jury must always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value and if so, what weight should be attached to it. Further, in considering whether the case for the prosecution has satisfied them of the defendant's guilt beyond reasonable doubt, and in considering their verdict, they should bear the unsworn statement in mind, again giving it such weight as they think it deserves. While the actual language used to convey the directions to the jury is a matter of choice for the judge, it will always be helpful to keep in mind that, subject to the need to tailor the directions to the facts of the individual case, there is no particular merit in gratuitous inventiveness in what is a well settled area of the law.

[50] The latitude afforded by ***DPP v Walker*** to trial judges 'to explain the inferior quality of an unsworn statement in explicit terms', as Lord Steyn put it in ***Mills and Others v R***, must, in our view, be circumscribed by the considerations generally of the kind referred to in the Board's guidance. Thus, as Lord Salmon explained in ***DPP v Walker***, the judge could quite properly go on to say to the jury that they may perhaps be wondering (in keeping with what Carey JA described as 'the natural curiosity an intelligent juror would have') whether there was anything behind the defendant's election to make an unsworn statement, such as a reluctance to put his evidence to the test of cross-examination. But at the end of the day, as this court has repeatedly emphasised, the jury must be told unequivocally that the weight to be attached to the unsworn statement is a matter entirely for their assessment. Given that the defendant's defence is more often than not stated in the unsworn statement, a failure to give directions along these lines may effectively deprive the defendant of a fair consideration by the jury of his stated defence. This is therefore essentially a fair trial issue.

> [51] Carey JA's characteristically trenchant description of the right to make an unsworn statement as a 'vestigial tail' of the law of evidence may well reflect a view shared by many, though certainly by no means at all, persons involved in the system of criminal justice in this jurisdiction. But, in our view, for so long as it remains a right available to defendants, it is incumbent on trial judges to direct juries as to its effect fully in accordance with the authorities. This view of the matter remains unaffected, it seems to us, by Lord Clyde's dismissal of the unsworn statement in ***Alexander von Starck v R***, echoing Lord Steyn in ***Mills and Others v R***, as 'significantly inferior' to oral evidence. As has been seen (at para. [47] above), Lord Griffiths expressed a similar view, perhaps less definitively, in ***Solomon Beckford v R***, in his observation that the unsworn statement 'is acknowledged not to carry the weight of sworn or affirmed testimony'. Whether this is so or not from an objective standpoint, the fact remains that (a) as Gordon JA put it in ***R v Michael Salmon*** (at page 3), '[i]n our law an accused has a right to make an unsworn statement in his defence'; and (b) the value of an unsworn statement in a particular case is still purely a jury matter."

[24] It is also settled law that the unsworn statement of an accused is not evidence against his co-accused and cannot be used against the co-accused, and the jury must be directed accordingly (see **Ibanez**; **R v Coughlan**; and **R v George**). Neither can a co-accused rely on the unsworn statement of a co-defendant as 'evidence' in support of his case (see **R v Coughlan**) or call evidence to rebut the unsworn statement (see **R v George**).

[25] There is no gainsaying that the right to make an unsworn statement may be especially beneficial to the accused who is lacking in the ability to articulate facts and comprehend questions, propositions and suggestions in the normal course of a trial. But, Morrison P's exhortation against "gratuitous inventiveness" in giving directions about this right, in no way diminishes the challenge which is posed to a co-accused who is implicated in the unsworn statement. There is the real danger of the jury being utterly confused if they are not directed dexterously, so as to appreciate the value of the accused's version

of the facts which are given, not under oath and not subject to cross-examination, whilst also protecting the right of the co-accused from untested accusations or otherwise prejudicial statements.

[26] Appropriately, the learned trial judge in her summation, recognized Mr Robinson's right to give an unsworn statement on which he could not be cross–examined, and she gave directions that it was for the jury to determine what weight they would give to the statement. The learned trial judge also directed the jury that although Mr Robinson did not give sworn evidence, they could not assume that he was guilty, and they should consider the content of the unsworn statement in relation to the whole of the evidence and ultimately decide what value to attach to it. She directed the jury to decide whether the prosecution had satisfied them to the extent that they felt sure of Mr Robinson's guilt. She directed the jury on the legal implications of Mr Robinson's unsworn statement in relation to himself. She brought to their attention that he was raising the defence of duress and if they found that he did not act on his own free, in disposing of the alleged murder implements, he would not be guilty.

[27] The learned trial judge also warned the jury to keep in mind that Mr Robinson's evidence could be self-serving and that it was not tested under cross-examination. She impressed upon them what Mr Clarke had said in his defence. She reiterated that the jury must consider the case against each accused separately and that their verdicts needed not be the same. She indicated to the jury that if they were not sure whether Mr Robinson was a party to the agreement to kill the deceased, they must return a verdict of not guilty for the offence of murder.

[28] However, at page 3775, lines 13 – 18 of the transcript, the learned trial judge gave this direction to the jury:

> "You should, therefore, consider the content of [Mr Robinson's] unsworn statement, especially as it relates to his co-defendant, Mr Clarke, and determine whether his unsworn

> statement has any value and, if so, what weight you should attach to it."

[29] The learned trial judge erred in this regard as the unsworn statement by Mr Robinson could not be used against Mr Clarke. It could only be used against Mr Robinson and, therefore, absolutely no weight could have been attached to it in relation to Mr Clarke. The learned trial judge ought to have clearly and expressly directed the jury that the unsworn statement was not evidence against Mr Clarke. This was not done.

[30] The failure by the learned trial judge to properly direct the jury as to the value (or lack thereof) of Mr Robinson's unsworn statement, in respect of Mr Clarke, meant that there was a real risk that Mr Clarke was exposed to adverse findings by the jury, as a result of Mr Robinson's unsworn statement, which he ought not to have been exposed to.

[31] In this regard, Mr Clarke, was not afforded a fair trial. The Crown was correct to have conceded this point.

[32] For these reasons, we find that there is merit in ground 1.

Ground 2 – The learned trial judge misdirected the jury when she failed to give them directions on how to treat the hearsay contained in the various out of court statements of Arthur Robinson with respect to Mr Clarke

[33] Miss Burgess submitted that the various out of court statements by Mr Robinson were only admissible against him because of the hearsay exception in respect of admissions and confessions. The basis of the hearsay exception with respect to confessions and admissions is that they are a declaration against self-interest, she asserted. Accordingly, the out of court statements of Mr Robinson (and Mr Newland), in so far as they cast blame on Mr Clarke, would not fall into that category. What is more, those statements were repeated by several witnesses, thus amplifying the prejudicial effect to Mr Clarke. Counsel pointed to the evidence of Detective Inspector Coleman and Detective Sergeant Duncan, in particular, which repeated the allegations that Mr Clarke

procured the murder of the deceased, and contended that the learned trial judge failed to direct the jury on how to treat with that evidence.

[34] The learned trial judge should have told the jury that the out of court statements were hearsay and did not constitute evidence on which they could rely to find Mr Clarke guilty, counsel submitted. Also, the jury ought to have been told that an out of court confession, which implicates both its maker and a co-accused, is not evidence against the co-accused. Counsel further contended that as the only value in admitting the out of court statements was in proof of their content, the fact of doing so without appropriate directions to the jury would have resulted in an unfair trial for Mr Clarke. In support of this submission, she cited the case of **Kelvin Persad v The State of Trinidad and Tobago** [2007] UKPC 51 ('**Kelvin Persad**').

[35] Counsel also referred to the case of **R v Hayter** [2005] 1 WLR 605, where the House of Lords held that a jury could properly find that a co-defendant was guilty on the basis of his own out of court confession, and then go on to find that the fact of the co-defendant's guilt coupled with any other evidence incriminating the defendant was sufficient to prove the defendant's guilt. However, counsel submitted that the instant case did not fall within this exception because Mr Robinson had denied that his out of court statements were voluntary and gave an entirely different unsworn statement in court in which he denied killing Mrs Clarke. Additionally, the jury had not been directed that they would have had to first find Mr Robinson guilty of murder before considering whether Mr Clarke had procured murder.

[36] Counsel submitted that the learned trial judge had also failed to sufficiently distinguish between the evidence against Mr Clarke and Mr Robinson. It was necessary that the evidence be parsed and the jury properly guided on how the evidence should be applied in relation to each of the accused. This was another dimension to the unfair trial, counsel submitted.

[37] Miss Pyke conceded that the learned trial judge should have given the jury directions on how to use the out of court statements of Mr Robinson, as the court in **Kelvin Persad** had made clear the principle that an out of court admission by one accused was inadmissible against a co-accused.

[38] She, however, submitted that **Kelvin Persad** and **R v Hayter** were irrelevant to the instant case because the prosecution was not relying on the evidence against Mr Robinson to prove the guilt of Mr Clarke. Counsel also submitted that the absence of the out of court statements made by Mr Robinson would not have rendered the prosecution unable to prove its case against Mr Clarke as there was other credible and discrete evidence that incriminated him.

[39] There is no need for a lengthy exposition on this issue, especially in the light of the Crown's concession that the learned trial judge erred when she failed to direct the jury that, generally, an out of court admission by one accused is inadmissible against a co-accused for all purposes. The law is settled that "[i]n the ordinary way, …out of court admissions are inadmissible against a co-defendant for all purposes. They are, indeed, only admissible against the maker himself by way of an exception to the hearsay rule" (see para. 15 of **Kelvin Persad**).

[40] However, in **Kelvin Persad**, the Privy Council recognized that the House of Lords had made a "modest adjustment" to this principle in **R v Hayter**, where Lord Steyn, at para. 25, stated that "only a modest adjustment of the rule about out of court confessions in joint trials is necessary". As contained in the headnote of **R v Hayter**, the House of Lords held that:

> "[W]hen in a joint trial the case against a defendant depended on the prosecution proving the guilt of a co-defendant, and the evidence against the co-defendant consisted solely of his own out of court confession, then that confession would be

> admissible as against the defendant only in so far as it went to proving the co-defendant's guilt; that the admissibility of the confession as against the defendant was subject to two conditions, first, that the jury were sufficiently sure of its truthfulness to decide that on that basis alone they could safely convict the co-defendant, and, secondly, that the jury were expressly directed that when deciding the case against the defendant they must disregard entirely everything said by the co-defendant in the confession which might otherwise be thought to incriminate the defendant; that at the end of the prosecution case the defendant would have a case to answer, because the jury could properly find that the co-defendant was guilty on the basis of his own confession, and then go on to find that the fact of the co-defendant's guilt coupled with any other evidence incriminating the defendant was sufficient to prove his guilt…"

[41] This is the "modest adjustment" to the rule that out of court admissions by a co-defendant is not evidence against another defendant. Accordingly, if a jury finds that a co-defendant was guilty on the basis of his own out of court confession, then the jury could go on to find that the fact of the co-defendant's guilt coupled with any other evidence incriminating the other defendant was sufficient to prove the other defendant's guilt.

[42] This "modest adjustment" to the rule, however, made no difference to the issue in the case before us as the prosecution was not relying on the guilt of Mr Robinson to find that Mr Clarke was culpable. What the prosecution sought to establish was that there was a pact between Mr Clarke, on one hand, and Messrs Robinson and Newland, on the other, in which Mr Clarke would have promised Messrs Robinson and Newland money in exchange for killing his wife.

[43] The learned trial judge, in the circumstances, ought to have impressed upon the jury that any out of court admission by Mr Robinson, which implicated Mr Clarke, could not be used against Mr Clarke. That was not done. As a consequence, Mr Clarke's right to a fair trial was compromised.

[44] As it relates to out of court statements made by Mr Newland, Miss Burgess submitted that although the learned trial judge told the jury that they could not use the out of court statements of Mr Newland against Mr Clarke, she invited them to find whether he was a credible witness without going on to say for what purpose. They should have been told that the only value of the witness statements, in particular (the content of which he denied), would have been to determine his credibility. However, the tenor of the learned trial judge's summation was that it was open to the jury to find that Mr Newland was lying in court but that his out of court statements contained the truth as to what happened in relation to the killing. That was a material misdirection which rendered Mr Clarke's trial unfair, counsel submitted.

[45] In response, Miss Pyke contended that the learned trial judge gave a clear, comprehensive and detailed direction that the jury should only have regard to what Mr Newland had said in court; specifically, that he had killed the deceased without the aid of anyone, without any plan, and that he did not know Mr Clarke or Mr Robinson. In so doing, she correctly and properly directed the jury on how to assess the evidence of Mr Newland which was given in court and whether they should believe him, having regard to the fact that he was treated as a hostile witness. It was not a misdirection for the jury to have been told that they should consider the credibility of Mr Newland, having regard to the fact that he said he killed the deceased and that he did so without the help of anyone. Besides, Mr Newland's evidence that he did not know the appellants would have buttressed the defence of Messrs Clarke and Robinson. She had also directed the jury that they could not use the fact that Mr Newland pleaded guilty to convict Mr Clarke or Mr Robinson.

[46] Relying on the direction in **R v Maw** [1994] Crim LR 841, counsel submitted, as well, that it was open to the jury to consider those aspects of the evidence which were material to the ingredients of the offence of murder. From Mr Newland's evidence, the prosecution was able to establish that the deceased was murdered, thereby providing not

only background material, but establishing that the injuries were not accidental or caused by the deceased falling and bumping her head, as Mr Clarke had insinuated. Mr Newland's evidence was also consistent with the findings by the pathologist as to the weapons which caused the injuries, and provided a basis on which the jury could reasonably infer that the deceased was killed by more than one person. Those aspects of Mr Newland's evidence were therefore material for the ingredients of murder.

[47] An examination of pages 3777 – 3778 of the transcript shows that the learned trial judge gave the following directions to the jury:

> "Now you will recall that in addition to the evidence [Mr Newland] gave before the court, there were two other statements that were alleged to have been made by Mr Newland. Now one was Exhibit 13 and one was Exhibit 16…
>
> Now, let me tell you that these earlier statements are not evidence of the truth of their contents, bearing in mind that he has denied making them. They were put before you by the Prosecution, to throw doubt on the reliability of his evidence here in this court. You have to decide whether you can accept any part of the evidence which he has given in this court, and if so, what part of it. If you decide that there is a serious conflict between the evidence he gave to you and the statement which the Prosecution is saying that he previously made and which he denied, you may think that you should reject his evidence all together and not rely on anything he has said in the witness box, because it goes to his credibility….
>
> I must further warn you not to regard the earlier out-of-Court statements as evidence against the accused, because it is not. The evidence is what he told you on oath from the witness box in this Court. And like any other witness you may accept what he has told you, or reject what he has said, or you may accept a part of what he has said and reject another part if you believe he spoke the truth about some things or lied about other matters, or was mistaken."

[48] Although the learned trial judge told the jury that Mr Newland's out of court statements were not to be regarded as evidence against his co-accused and that they

went to the credibility of Mr Newland, she failed to follow the guidance enunciated in **R v Maw**, a case to which reference will again be made later in this judgment. Given the fact that Mr Newland, while giving evidence was treated as hostile, it was necessary that the jury be told that they should consider whether he should be treated as creditworthy, that is, whether they could believe a witness who had contradicted himself, and only if they did, could they go on to accept or reject aspects of his evidence.

[49] As was explained in **R v Maw**, it was not proper for the jury to be directed to go straight to the stage of considering which parts of Mr Newland's evidence, if any, were worthy of acceptance.

[50] In our view, the direction to the jury, in this regard, fell short of what was required.

[51] We also believe that the learned trial judge's direction was inadequate to counter the risk of prejudice which could have been caused by inconsistent material being put before the jury. Without a clear and proper direction on how to treat with the evidence of an impeached witness, we do not see how the jury could have safely chosen to "reject" what Mr Newland had said, in court, without there being a likely morphed acceptance that Mr Newland did not commit the murder alone and that Messrs Clarke and Robinson were involved. Mr Clarke was, therefore, at risk of the jury accepting material which was prejudicial to him.

[52] As regards whether Mr Newland's witness statements should have been admitted into evidence, we do not find that there was any useful purpose for that to have been done. Those statements could not assist the prosecution in proving the guilt of either Mr Clarke or Mr Robinson. Besides, it had already been established, on the prosecution's case, and from cross-examination, that Mr Newland had made previous inconsistent statements. There was, therefore, no need to risk prejudicing the jury against Messrs Clarke and Robinson, by admitting Mr Newland's witness statements in evidence. As was

argued by Miss Burgess, the prejudicial effect of admitting his witness statements in evidence outweighed the probative value. We agree with Miss Burgess.

[53] For these reasons there is merit in ground 2.

Ground 3 – That the learned trial judge erred in law when she failed to give a warning that it was dangerous to convict on the uncorroborated evidence of alleged accomplices which rendered the trial unfair

[54] This ground was presented as an alternative position to ground 2. Miss Burgess argued that even if the out of court statements of Messrs Newland and Robinson had been properly admitted, the learned trial judge was required to warn the jury about the danger of accepting the uncorroborated evidence of an accomplice, and that it was, in fact, dangerous to convict on the uncorroborated evidence of alleged accomplices. Counsel also contended that the learned trial judge would have been further obliged to identify evidence which could amount to corroboration.

[55] In support of this submission, counsel relied on this court's observations at page 16 in **R v David Gordon** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 161/2001, judgment delivered 12 December 2002, that "[t]he cases seem to establish that in a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the trial judge to warn the jury that, although they may convict upon his evidence it is dangerous to do so unless it is corroborated. This rule, although a rule of practice, has the force of a rule of law".

[56] Counsel submitted further that a mere warning to the jury that the witness had an interest to serve was insufficient to satisfy the requirement. She highlighted the fact that both Messrs Robinson and Newland, who were witnesses against Mr Clarke, had recanted their earlier witness statements.

[57] Miss Pyke countered that, with regard to the giving of an accomplice direction in respect of Mr Robinson, this ground has no merit as Mr Robinson is the co-accused of Mr

Clarke. She referred to the case of **R v Peter Blaine and Neville Lewis** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 106 & 107/94, judgment delivered 31 July 1995, in support of her argument that an accomplice direction should not be given in respect of a co-accused, whether that co-accused gives sworn evidence or a statement from the dock.

[58] Counsel argued that Mr Robinson's unsworn statement was given in his defence at trial and, having regard to the importance of his defence being fairly put to the jury, it would be a misdirection to give an accomplice direction bearing in mind the content of the warning. Counsel contended that a balanced direction was required to safeguard both accused. An accomplice direction, in the circumstances, would have usurped the jury's function since it was for them to determine whether Mr Robinson had participated in the killing and whether he did so along with Mr Clarke.

[59] Counsel concluded that the trial against Mr Clarke was clear as there was ample evidence on the prosecution's case to prove Mr Clarke's guilt, even if what Mr Robinson said was excluded. Conduct, motive and opportunity were the pillars of the prosecution's case against Mr Clarke.

[60] As it relates to the evidence of Mr Newland, Miss Pyke argued that what has been advocated on Mr Clarke's behalf was for the learned trial judge to have told the jury that Mr Newland participated in the murder of Mrs Clarke as a principal or an accessory after the fact, or that he aided and abetted the murder, when there was no evidence adduced from him that he committed the murder of Mrs Clarke with anyone else. Counsel contended that the authorities are clear, that an accomplice is someone who has participated in the committing of the offence whether as principal or accessory. In support of these arguments, she relied on the case of **Lawrence Brown v R** [2016] JMCA Crim 33.

[61] At any rate, counsel argued, Mr Newland could not be considered an accomplice having regard to his evidence that he acted alone in killing Mrs Clarke and that he did not know Mr Clarke or Mr Robinson. It would have been inappropriate, therefore, for the learned trial judge to have given an accomplice direction with regard to Mr Newland as the effect of such a warning would have been to suggest that Mr Newland committed the crime with someone, which, on his evidence, would be factually incorrect. Counsel also submitted that an accomplice direction against Mr Newland would have presupposed that he gave probative evidence which incriminated Messrs Clarke and Robinson. However, it could not be argued that Mr Newland gave incriminating evidence against Messrs Robinson and Clarke as he said he carried out the killing by himself.

[62] In the alternative, Miss Pyke submitted that the absence of an accomplice direction from the learned trial judge, if one were needed, would not have prejudiced Mr Clarke and thus the proviso provided under section 14(1) of the Judicature (Appellate Jurisdiction) Act ('JAJA') would be applicable.

[63] It is clear to us that the prosecution relied on the principles of joint enterprise and proof of circumstantial evidence in its case against Mr Clarke. It was expected that Mr Newland would have provided supporting evidence, but Mr Newland's evidence fell way below the mark. In fact, he gave no evidence in support. Evidently, the prosecution's objective behind tendering Mr Newland's witness statements was to discredit him. We have already found that the prejudicial effect of admitting those statements in evidence outweighed any probative value. It is therefore not necessary to delve deeply into the alternative position to that finding. We need only say, on the strength of the authorities, going as far back as **R v Baskerville** [1916-17] All ER 38, that it has long been the principle to warn the jury about the danger of acting on the uncorroborated evidence of an accomplice testifying on behalf of the prosecution. In **R v David Gordon**, Smith JA referred to this principle, at page 16, when he stated that:

> "The cases seem to establish that where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the trial judge to warn the jury that, although they may convict upon his evidence it is dangerous to do so unless it is corroborated. This rule although a rule of practice has the force of a rule of law."

[64] The court's observations in **Davies v Director of Public Prosecutions** [1954] AC 378, are also relevant where Lord Simonds LC, at pages 401 – 402, stated:

> "My Lords, I have tried to define the term 'accomplice.' The branch of the definition relevant to this case is that which covers 'participes criminis' in respect of the actual crime charged, 'whether as principals or accessories before or after the fact.' But, it may reasonably be asked, who is to decide, or how is it to be decided, whether a particular witness was a 'particeps criminis' in the case in hand? In many or most cases this question answers itself, or, to be more exact, is answered by the witness in question himself, by confessing to participation, by pleading guilty to it, or by being convicted of it. But it is indisputable that there are witnesses outside these straightforward categories, in respect of whom the answer has to be sought elsewhere. The witnesses concerned may never have confessed, or may never have been arraigned or put on trial, in respect of the crime involved. Such cases fall into two classes. In the first, the judge can properly rule that there is no evidence that the witness was, what I will, for short, call a participant. The present case, in my view, happens to fall within this class, and can be decided on that narrow ground. But there are other cases within this field in which there is evidence on which a reasonable jury could find that a witness was a 'participant.' In such a case the issue of 'accomplice vel non' is for the jury's decision: and a judge should direct them that if they consider on the evidence that the witness was an accomplice, it is dangerous for them to act on his evidence unless corroborated: though it is competent for them to do so if, after that warning, they still think fit to do so."

[65] Accordingly, a judge ought to direct a jury that if they consider, on the evidence, that a witness is an accomplice, it is dangerous for them to act on his evidence unless

corroborated. Factually, whether a particular witness is an accomplice is a question usually answered by the witness himself, by confessing to participation, by pleading guilty to it, or by being convicted of it. If not answered by the witness himself, the question whether he was in fact an accomplice is for the jury, provided that there was evidence on which a reasonable jury could have concluded that the witness was an accomplice.

[66] In the instant case, Mr Newland's evidence did not justify an accomplice direction against him, as on the facts he could not be treated as an accomplice. Throughout his testimony, Mr Newland distanced himself from Messrs Clarke and Robinson, and he did not claim to be an accomplice. He had confessed to being the sole murderer and pleaded guilty to the crime.

[67] As indicated earlier, Mr Robinson did not give evidence at the trial; he instead gave an unsworn statement from the dock. Suffice it to say, the UK Court of Appeal in **R v Cheema** [1994] 1 All ER 639, held that "[t]here was no rule of law which required a full corroboration direction in respect of a co-defendant's evidence. All that was required when one defendant implicated another in evidence was simply a warning to the jury of what might very often be obvious, namely that the defendant witness may have had a purpose of his own to serve..." (see the headnotes).

[68] Additionally, it was made clear in **R v Peter Blaine and Neville Lewis** that where persons are charged jointly with the same offence and one gives evidence implicating the other or others, then his evidence becomes evidence in the case and no accomplice direction is required. At page 15, Gordon JA observed that:

> "The warning given above by the learned trial judge is that which would be given in regard to the evidence of an accomplice. Where however prisoners are charged jointly with the same offence and one gives evidence implicating the other or others, then his evidence becomes evidence in the case and no warning is required. In Archbold Criminal Pleading

1992, the learned author states the principle at paragraph 15 – 315 thus:

> 'If a defendant goes into the witness-box and gives evidence in the course of a joint trial, then what he says becomes evidence for all purposes of the case including the purpose of being evidence against his co-defendant: R. v. Rudd [32 Cr App R 138]. The judge in his direction may think it proper to warn the jury that a co-defendant may have some purpose of his own to serve in giving evidence and that accordingly it would be dangerous to act on his uncorroborated evidence: R. v. Prater (1960) 44 Cr.App. R. 83, C.A.; R. v. Stannard and others (1964) 48 Cr. App.R. 81, C.A…"

[69] The fact that Messrs Robinson and Clarke were charged jointly with the same offence, any evidence that Mr Robinson would have given, which implicated Mr Clarke, would have become evidence in the case and no accomplice direction would have been required. In the instant case, however, Mr Robinson gave no evidence. What he gave was an unsworn statement from the dock. In the result, it was not required or, indeed, proper for there to have been a corroboration direction.

[70] For these reasons, we agree with Miss Pyke that ground 3 lacks merit.

[71] As can be seen, Mr Clarke has succeeded on the material grounds. This is a sufficient basis on which to hold that his appeal has merit. Accordingly, we will grant the application for leave to appeal and order that these proceedings be treated as the appeal. The question as to whether the appeal should be allowed will be considered later in this judgment.

Arthur Robinson

[72] Mr Robinson was granted permission by the court to abandon his original grounds of appeal and to argue, instead, the following supplemental grounds of appeal:

"1. The Learned Trial Judge erred in law by admitting the Caution Statement of the Applicant [sic] to be admitted [sic] as evidence in the trial.

2. Having allowed the Caution Statement to be admitted as evidence, the Learned Trial Judge failed to give adequate warning and directions to the jury, in relation to how to treat with the evidence.

3. The Learned Trial Judge erred in law by allowing several bits of confession and implied confession and acts [sic] as evidence without the necessary enquiry and determination of voluntariness and fairness.

4. The Learned Trial Judge erred in law by allowing the police witness statement of Emmanuel Newman [sic] to be admitted into evidence as an exhibit and no direction given to the jury in this case could cure this defect.

5. The Learned Trial Judge erred in law by allowing the witness statement of the absent Assim Straw, being hearsay, to be admitted as evidence even though that statement did not satisfy the threshold of Section 31 of the Evidence Act.

6. The Learned Trial Judge miss-directed [sic] the jury on the facts by saying that the Appellant said that he assisted Mr Clarke to dispose of the items that were used in the commission of the offence. The miss-direction [sic] was fatal being so close to the jury retirement and optional verdicts, the jury was asked to consider."

Ground 1 – The learned trial judge erred in law by admitting the caution statement of Mr Robinson as evidence in the trial

[73] At the trial, evidence was elicited by the prosecution from Sergeant Duncan that he took Mr Robinson into custody on 1 November 2007 and that Mr Robinson gave a caution statement on the same day. There was also evidence from Inspector Coleman about the circumstances in which the caution statement was taken.

[74] In determining the admissibility of the caution statement, the learned trial judge embarked upon a *voir dire* to ascertain whether the caution statement was given voluntarily, and whether, in all the circumstances, it would be fair to admit it. In the end, Mr Robinson's caution statement was admitted as evidence.

[75] Mr Equiano, counsel on behalf of Mr Robinson, acknowledged that the issue of admissibility of a caution statement was for the trial judge, but that voluntariness and, to a greater extent, fairness were the legal pillars. Counsel contended that while the learned trial judge alluded to the standard of voluntariness and fairness, she did not apply that standard, because, if she did, the caution statement of Mr Robinson would not have been admitted into evidence.

[76] He proffered four reasons for challenging the learned trial judge's summation on this point. Firstly, she erred in finding that the question of admissibility essentially came down to the credibility of the witnesses who were called during the *voir dire*. Secondly, she failed to, or failed to sufficiently, consider that even if the prosecution witnesses, the teacher and the JP could be credible witnesses, the caution statement would be inadmissible on the basis of other factors such as a finding that Mr Robinson's reasonable comfort was not taken into consideration while giving the statement. Thirdly, she failed to sufficiently consider that even if the police were correct that Mr Robinson requested the presence of his teacher, in place of his parents, he was a minor and the request was insufficient authority for the police to override the legal role of his parents and to transfer that responsibility to his teacher. Fourthly, she failed to consider that the evidence of the prosecution, taken as a whole, was unsatisfactory to meet the requisite standard for admission of the caution statement.

[77] Counsel submitted that, in our jurisdiction, the conduct of interviews with suspects is governed by the Jamaica Constabulary Force Rules, the Judges' Rules, and the Legal Aid Regulations, 2000. He cited the case of **Shabadine Peart v R** [2006] UKPC 5 ('**Peart v R**'), which considered the applicability of the Judges' Rules to Jamaica and the criterion

of voluntariness for admission of a confession. He submitted that although the Judges' Rules are administrative directions and not rules of law, they nevertheless embody the standard of fairness which ought to be observed. He also relied on the authority of **Ricardo Williams v R** [2006] UKPC 21 ('**Williams v R**'), where the Privy Council explained directions no 3 and 4 of the Administrative Directions on the Interrogation and the Taking of Statements, located at Appendix B of the Judges' Rules. In that case, their Lordships found it to be significant that the judge had not referred to the Judges' Rules, the appellant's age, or the circumstances in which he was exercising his discretion.

[78] Mr Equiano posited that there had been wanton, inexplicable, and deliberate breaches of internal policy, procedure and force orders, regarding the police's taking of the caution statement from Mr Robinson. He referred to the following particulars:

i. Mr Robinson was a child of age 15 years;

ii. His parent(s) or guardian was not invited to participate;

iii. He did not have the benefit of legal representation;

iv. He was in the police station for over five hours before the caution statement was taken.;

v. The prosecution did not adduce any evidence of the circumstances that would have caused him to speak to the police officer or to state his desire to talk;

vi. The JP did not talk to him in private before the taking of the statement;

vii. No enquiries were made of him in private to ascertain his reasons for wanting to talk;

viii. Neither the JP nor the police officers made any enquiry of Mr Robinson regarding his well-being and comfort; and

ix. He was taken through an unusual route from one police station to another before his request to talk.

[79] Counsel further submitted that the prosecution should have presented reliable and cogent evidence to satisfy the court of the full circumstances under which Mr Robinson was held at all material times. This would include all the periods which led to, or could have led to, the impugned caution statement being taken, and a full and proper account of the person(s) with whom Mr Robinson engaged while he was being held at the Watt Town and Brown Town Police Stations, prior to the recording of the caution statement. Counsel observed that none of the investigators could account for the period in custody which preceded the taking of the caution statement, or provide an explanation for the whereabouts of Mr Robinson.

[80] Counsel argued that even if this court were minded to hold that the trial judge was entitled to find that the caution statement was 'voluntary', the circumstances of Mr Robinson's detention and those surrounding the taking of the statement created significant unfairness to him. He cited the authority of **Williams v R** in support of this argument. Mr Equiano contended that based on the authority of **Richard Scott and another v R** [1989] AC 1242, the learned trial judge had a discretion at common law to exclude evidence, if necessary, in order to secure a fair trial for the accused, and that evidence which only lightly assisted the prosecution to establish the offence but greatly damaged the credibility of the accused, should also be excluded.

[81] Counsel was also of the view that the learned trial judge seemed to have resolved the issue of admissibility solely on the basis of the credibility of the witnesses and equated credibility with voluntariness. That approach, he submitted, failed to consider the factors

outlined in **McPhee v R** [2016] UKPC 29. He highlighted the following aspects of the learned trial judge's reasons on pages 955 to 956 of the transcript to support his point:

> "…Mr. Basil Gregory and the Justice of the Peace, Mr. Redway were credible witnesses. In the case of Mr. Gregory, the accused Form Teacher, no reason was advanced why he should come to this court and not speak the truth. In the case of Mr. Redway, he is a Justice of the Peace and was carrying out his duties. As such I found him to be honest and truthful witness, who had no interest to serve in this case.
>
> …
>
> Mr. Robinson, on the other hand, did not seem very forthright, especially when he was tested under cross-examination. His witness, Miss Angela, came, but did not assist the Court to the question as to whether the statement was freely and voluntarily given.
>
> Having not accepted Mr. Robinson's account, I find that the statement was freely and voluntarily given. On the question of the reasonable comfort of Mr. Robinson, whilst giving his statement, he being a minor at the time. Although, I found that his reasonable comfort was not taken into consideration, and this was most undesirable, I do not find that it impacted his level of comfort to the extent that it affected the giving of his statement. I, therefore, ruled that the statement marked HC1, be admitted into evidence."

[76] Counsel concluded where he began by reiterating that the admission of Mr Robinson's caution statement would have had such an adverse effect on the fairness of the proceedings that the learned trial judge ought not to have permitted it.

[82] In response, Miss Pyke submitted that she took no issue with the principles of law raised by Mr Equiano arising from the Judges' Rules, **Peart v R**, and **Williams v R**. However, as it relates to the case of **McPhee v R**, counsel submitted that that case, was distinguishable from the instant case.

[83] Counsel submitted that it is settled law that the prosecution must establish that the caution statement was voluntarily given, and that it was a matter for the discretion of the trial judge who must examine all the circumstances and conditions which arise on the evidence, and apply the law to those circumstances in order to come to a decision. The question is one of fact and law and the court must examine the evidence to ascertain what facts had been proved and whether the circumstances came within the legal requirements. Counsel also pointed out that since the court had to determine which witnesses were to be believed, credibility was an issue for the learned trial judge. She had to consider whether the witnesses for the prosecution were credible, and whether, in law, the caution statement should be admitted.

[84] Counsel contended that when the reasons of the learned trial judge are looked at, as a whole, it is clear that she bore in mind all the legal requirements of voluntariness, fairness, and the need for there to have been an absence of oppression. In support of this argument, counsel submitted that the learned trial judge had acknowledged and reminded herself of the following:

(i) the evidence of Mr Robinson where he described being threatened with a firearm to say that he was culpable, and that it was as a result of these threats that he gave the caution statement;

(ii) that Mr Robinson was a minor at the time of making the caution statement and that certain enquiries ought to have been made by the police and the JP about his reasonable comfort;

(iii) the submission of counsel for Mr Robinson that it was a deliberate ploy by the police to isolate Mr Robinson from his mother so that they could intimidate, threaten and make him fearful;

(iv) the principle established in **Williams v R** that the criterion for admission is fairness;

(v) Appendix B of the Judges' Rules, direction no 4, which states that "[a]s far as practicable children (whether suspected of a crime or not), should only be interviewed in the presence of a parent or guardian, or, in their absence, some person who is not a police officer or is of the same sex as the child...";

(vi) the submission of counsel for Mr Robinson that, even if Mr Robinson had told the police he did not wish for his mother to be present at the recording of the caution statement, the police should have taken steps to get another relative and advise his mother as to what was taking place so that adequate representation could have been provided;

(vii) the submissions, on behalf of the prosecution, that Mr Robinson had requested his teacher to be present, that the alleged threats against Mr Robinson were denied by the police witnesses, and that the form teacher indicated that Mr Robinson appeared calm, was not agitated, and confirmed, upon enquiry being made, that it was true that he wanted to give a statement to the police;

(viii) that the caution statement of Mr Robinson could only be used as evidence if it was freely and voluntarily given, and not extracted or induced by any sort of threat, or obtained by any promise or favour, or by any coercion or by improper influence;

(ix) that the prosecution had to prove beyond reasonable doubt that the caution statement was free and voluntary; and

(x) the details of the evidence of Mr Robinson that up to the time when he gave the caution statement, which was some minutes after 9:00 pm, he was not offered anything to eat or drink. Prior to that, he had

> breakfast early in the morning and a "Chubby" to drink. He had nothing else for that day.

[85] Miss Pyke further submitted that the learned trial judge indicated that the question whether the statement was freely and voluntarily given, came down to the credibility of the witnesses who were called during the *voir dire*. In this regard, the learned trial judge found that the witnesses for the prosecution were credible, especially the teacher and the JP whom she said did not have an interest to serve. On the other hand, she found that Mr Robinson was not forthright, especially when he was tested under cross-examination.

[86] Counsel also pointed out that the learned trial judge found that Mr Robinson's reasonable comfort was not taken into consideration, which was most undesirable, but that it did not affect the giving of his caution statement. This, counsel submitted, clearly showed that the learned trial judge considered that comfort was a major issue, and she asked herself what effect that might have had on the caution statement.

[87] Miss Pyke disagreed that the learned trial judge equated credibility with voluntariness. She said the learned trial judge had adverted to the correct test, took account of several factors that would go to fairness such as the reasonable comfort of Mr Robinson, enquiries made of him, what she believed he said in relation to his form teacher, his allegations of oppression and the manner in which the statement was recorded. In the absence of an error, counsel submitted, this court should not interfere with the learned trial judge's exercise of discretion.

[88] Miss Pyke went on to point out that the case of **Peart v R** confirmed that even where there was a finding of breach of the Judges' Rules, the statement could still be admitted, once it was voluntary. Consequently, even if it could be said that there was a breach of directive no 4 of Appendix B of the Judges' Rules, in that there ought to have been a parent or attorney-at-law present at the recording of the caution statement, it

was still open to the learned trial judge to admit the caution statement, having found that it was given voluntarily. Counsel also submitted that the authorities of **Peart v R** and **Williams v R** could be distinguished from the instant case because in those cases the judge had failed to appreciate that there was a breach of the Judges' Rules, unlike in the instant case, where the learned trial judge acknowledged all the factors. That being so, there was no basis for this court to review the decision.

[89] Miss Pyke further argued that although Mr Robinson, a minor then, was not interviewed in the presence of his parent or an attorney-at-law, he was nonetheless advised of his right to have them present. She submitted, with reference to the principles in **Hunte and Khan v The State of Trinidad and Tobago** [2015] UKPC 33 ('**Hunte**'), that Mr Robinson was aware of his rights and made a specific request for a person with whom he was comfortable. He specifically requested that his teacher be present, and the police acted in the spirit of the Judges' Rules, as they waited for his teacher to arrive before conducting the interview. In addition, a JP was present. The teacher and the JP were not persons connected to the police station or had any adverse intention towards him. He was very clear that he did not wish for his mother to be present and it was established from the evidence, in the *voir dire*, that he said so to more than one police officer.

[90] Counsel referred to, and relied on, the case of **Leroy Rolle v The Attorney General** (unreported), Court of Appeal, Commonwealth of the Bahamas, SCCrApp No 182 of 2010, judgment delivered 8 May 2012 ('**Leroy Rolle**'), for an explanation of who is an "appropriate adult". It was submitted that in some circumstances, even a parent might not be regarded as an appropriate adult, as occurred in **DPP v Blake** (1989) 89 Cr App Rep 79 (as cited in **Rolle** at para. 24).

[91] As to whether there was a breach of Mr Robinson's constitutional rights and the effect this would have on the discretion to admit the caution statement, counsel submitted that the police had discharged their duty to inform Mr Robinson about his rights and

arranged for his protection by ensuring that his teacher and the JP were present when his caution statement was taken. The police had also denied the allegations that Mr Robinson had been threatened. Miss Pyke submitted that counsel, on behalf of Mr Robinson, appeared to have been inviting this court to review the learned trial judge's decision without demonstrating that she erred in fact or law in arriving at her decision to admit Mr Robinson's caution statement in evidence.

[92] In determining whether the learned trial judge erred in admitting Mr Robinson's caution statement in evidence, we are guided by the following principle extracted from **Hunte**, that the correctness of admissibility of a statement in evidence is determined by asking two questions – first, whether the evidence was admissible as a matter of law; and second, whether it should be excluded for reason of unfairness. In **Hunte**, the first question was decided on a finding as to whether the statement was voluntary in the sense identified in para. (e) of the preamble to the Judges' Rules, which states that:

> "(e) That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression."

[93] At para. 25, Lord Toulson stated that:

> "As to the first question, the test of admissibility is whether the statements or alleged statements were voluntary in the sense identified in paragraph (e) of the Judges' Rules set out above. The trial judge asked herself the correct questions. She went further by considering whether the alleged statements were in fact made by Hunte. That was a question for the jury. Strictly, the judge's task in determining admissibility was limited to determining whether the alleged confessional statements, if made, were voluntary, but there was no prejudice to Hunte in the judge considering also whether she was sure that the alleged statements were made. Having

> heard the witnesses, the judge determined that she was sure that the statements were voluntary and the Board has no proper basis for holding that she was wrong. It was suggested that the judge failed to give adequate reasons, but she had heard the evidence and her findings were sufficient."

[94] In relation to question of fairness, Lord Toulson, at para. 28, stated that:

> "The Board has given the matter close consideration, because Mr Perry has rightly and ably identified a number of seriously unsatisfactory features. The question for the Board is whether it considers that in the result Hunte was deprived of a fair trial. That is not the Board's conclusion. Although the failure to allow Hunte to speak to Melville in private was inexcusable, the fact remains that he was advised not to make any statement to the police, and he knew that he had that choice. As to the making of any confessional statement, Hunte undoubtedly signed a confession statement after he had been spoken to in private by the JP, who had inquired whether he had been properly treated. The judge was properly entitled to leave to the jury to decide whether they were sure that the alleged oral statements and the written statement were of Hunte's own making and could be relied upon. His appeal is therefore dismissed."

[95] The Judges' Rules can be regarded as a compendium embodying the standard of fairness required of police officers when dealing with persons in relation to the investigation of crimes. They are predicated on the assumption that persons will be interviewed in relation to crimes, but in the case of a minor, a responsible adult needs to be present to ensure that the process is fair. In determining whether the statement is voluntary and if a minor had been treated fairly, there must be a full account of what transpired leading up to the caution statement (see generally, **McPhee v R**). It is a provision of the Judges' Rules that "[n]onconformity with these rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings." However, one takeaway from the cases is that a breach of the Judges' Rules does not make the caution statement inadmissible, provided it was voluntarily obtained, though,

in his or her discretion, the trial judge may refuse to admit it if he or she concludes that there is a breach of the Judges' Rules.

[96] In **Peart v R**, the court was concerned with the admissibility of a question and answer interview administered to the appellant after he was charged for murder, and without him having legal representation at the interview. The appellant was 18 years old at the time. Their Lordships expressly acknowledged the importance of the principle of voluntariness in determining admissibility where they opined at para. 23 that:

> "23. In their Lordships' opinion the overarching criterion is that of the fairness of the trial, the most important facet of which is the principle that a statement made by the accused must be voluntary in order to be admitted in evidence. There may be cases, as Lord Diplock observed in the passage quoted from *R v Sang,* where an admission has been voluntarily made but it would be unfair to admit it."

[97] Their Lordships, at para. 23, also agreed that factors such as the appellant's age at the time of his arrest, and the fact that he had not had the advice of an attorney-at-law, needed to be considered by a trial judge in determining whether to admit an accused's statement in evidence. At para. 24, the Board set out four propositions for guiding the court:

> "(i) The Judges' Rules are administrative directions, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed.
>
> (ii) The judicial power is not limited or circumscribed by the Judges' Rules. A court may allow a prisoner's statement to be admitted notwithstanding a breach of the Judges' Rules; conversely, the court may refuse to admit it even if the terms of the Judges' Rules have been followed.
>
> (iii) If a prisoner has been charged, the Judges' Rules require that he should not be questioned in the absence of exceptional circumstances. The court may nevertheless

admit a statement made in response to such questioning, even if there are no exceptional circumstances, if it regards it as right to do so, but would need to be satisfied that it was fair to admit it. The increased vulnerability of the prisoner's position after being charged and the pressure to speak, with the risk of self-incrimination or causing prejudice to his case, militate against admitting such a statement.

(iv) The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judges' Rules; but the court may rule that it would be unfair to do so even if the statement was voluntary."

[98] The primacy of fairness was affirmed in **McPhee v R** where the Privy Council considered, among other factors, that none of the officers were able to say what the appellant had been or might have been doing over a period of several hours, and that "it seems at least probable that something must have occurred to prompt [a Bishop being] called, and apparently something which led to the conclusion that the appellant would be willing to make a statement under caution. But there was no evidence from anyone at all what that might have been" (see para. 20 of **McPhee v R**). It was also observed that except for enquiring whether the appellant was hungry and giving him money, the Bishop saw his role as simply to witness the taking of the statement, and although he could speak to what obtained at the recording of the statement, he did not know what if anything had been said to or by the appellant over the 30 hours of detention before he arrived.

[99] At para. 8, the Privy Council explained the requirement for fairness in this way:

"8 Section 20(2) [of the Evidence Act] and voluntariness apart, the judge in a criminal trial has, by section 178 of the same Act, the power to exclude evidence on which the

> prosecution proposes to rely to be given if it appears to him that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. It is well established, and was not in dispute before the Board, that breaches by police interrogators of codes of practice and similar standards of behaviour are relevant to whether this power should or should not be exercised in relation to evidence resulting from interviews with suspects. As it was put in the Board's judgment in *Peart v The Queen* [2006] UKPC 5; [2006] 1 WLR 970, para 24 the criterion for admission of a statement [of confession] is fairness. A breach of proper practice does not necessarily result in unfairness such as to justify exclusion; it must be judged in the context of all the circumstances, foremost amongst which are its gravity and its consequences. A deliberate or reckless breach is plainly more serious than an accidental one."

[100] An assessment of the authorities has shown that fairness is the overriding criterion for admissibility of a statement, and that voluntariness of the statement is the leading factor in determining fairness. If it is not voluntary, the statement should not be admitted. If it is voluntary, that constitutes a strong reason for admitting it, notwithstanding a breach of the Judges' Rules, but the court may still rule that it would be unfair to do so. Accordingly, it was for the learned trial judge to determine voluntariness and even if she was correct that Mr Robinson made the statement voluntarily, she had to be also satisfied that in all the circumstances, admitting it was nevertheless fair.

[101] In this case before us, the learned trial judge acknowledged the importance of fairness in arriving at her decision to admit Mr Robinson's statement. She adverted to Appendix B of the Judges' Rules, in particular direction no 4 which deals with the interrogation of children and young persons. The learned trial judge seemed satisfied that although there was a breach of direction no 3 of Appendix B of the Judges' Rules (the reasonable comfort provision), there was no breach of direction no 4. She also concluded that the breach of direction no 3 was not fatal to the admission of the statement. Those

considerations formed the basis for the exercise of her discretion. She further referred to the submission, by counsel for Mr Robinson, that even if Mr Robinson had said he did not want his mother to be present, steps should have been taken to find a relative, and to advise his mother about what was done.

[102] The learned trial judge was correct in assessing the credibility of the witnesses for the prosecution and that of Mr Robinson and his mother, in arriving at what facts she accepted in relation to the *voir dire*. She was also correct to have considered the several matters she did, as enumerated by Miss Pyke. However, despite these assessments, she failed to demonstrate ample consideration of questions which had a bearing on whether Mr Robinson's caution statement had been obtained fairly. By way of example:

(a) What should be made of the absence of evidence from the prosecution as to all that was said or done by or to Mr Robinson, during the period of approximately six hours from approximately 4:00 pm to 9:20 pm, that is, between Mr Robinson being taken from his house by the police to the Watt Town Police Station and the time he gave the caution statement at the Brown's Town Police Station?

(b) With whom did he come in contact while at the Watt Town Police Station?

(c) What interactions, if any, did Mr Robinson have with the police while he was at Watt Town Police Station, prior to being transported to Brown's Town Police Station? And what was the nature of any interactions? There was evidence from Mr Robinson, at the *voir dire*, that while he was at Watt Town Police Station (while his mother was waiting outside), he was taken to a back room by Inspector Coleman and "a next police" and questioned

about what happened on 26 October 2007, and he kept telling them he did not know. Was this in fact so? It is observed that Sergeant Duncan, in his evidence before the jury, revealed that he had, on 1 November 2007, received from Inspector Coleman two statements which had been taken from Mr Robinson, one of which was the caution statement. But there was no evidence as to the time that the other statement was taken, and Inspector Coleman denied that he had taken a witness statement from Mr Robinson on 1 November 2007. Also, Inspector Coleman had testified, after the *voir dire*, that in a conversation he had with Mr Robinson on 1 November 2007 (the same date the caution statement was recorded), at Watt Town Police Station, he had asked him for "his clothing that he was wearing" and he (Inspector Coleman), along with other police personnel, took him to his home, some 10 minutes away, to retrieve the clothing, along with other items, after which he was returned to the Watt Town Police Station. In the face of challenge by counsel, regarding the date of this event, Inspector Coleman did not resile from his position that he had, in fact, done these things on that date.

(d) Where was Mr Robinson kept and with whom did he relate for the nearly four hours he would have been at the Brown's Town Police Station, prior to the recording of the caution statement? What, if anything, had been said to him over that period?

(e) What were the specific circumstances in which Mr Robinson indicated his desire to give a caution statement?

(f) What efforts, if any, were made to reach duty counsel? It was only after the *voir dire* that Inspector Coleman testified that efforts had been made to reach duty counsel but he gave no details.

(g) Was Mr Robinson properly advised of his right to an attorney-at-law and to have his parents present while he interacted with the police and at the recording of his caution statement? It was the evidence of Inspector Coleman, after the *voir dire*, that he had spoken to Mr Robinson at the Watt Town Police and informed him that it was his intention to take a statement from him at which time Mr Robinson would have said "Mr Gregory is my form teacher, mi do not want mi mother to know, to be here." Inspector Coleman also said that when he was advised by Mr Robinson, at the Brown's Town Police Station, of his intention to give a caution statement he (Inspector Coleman) told him that "his parents, form teacher or his attorney would have to be present" and he replied, "Mr Gregory, my form teacher is already here." If, in fact, those dialogues did take place, and that was the extent of what was said, would that have constituted advice to a 15-year-old of his rights? And would Mr Robinson's retort about his teacher's presence be sufficient to exclude his parents and duty counsel?

(h) Why did Inspector Coleman make no enquiries about Mr Robinson's mother? Could it have been in Mr Robinson's best interest to exclude her?

(i) What would have accounted for Mr Robinson's change of stance between the time he said he complained to his mother, while at the Watt Town Police Station, that the police "carry me come dung and put me down here fe sit down and nothing", and when he

would have decided to give the caution statement at the Brown's Town Police Station?

(j) Having regard to what Mr Robinson said he told his mother at the Watt Town Police Station, did he intend to accept responsibility for the crime?

(k) Was it that the officers were so interested in a confession that they were prepared to give in to the wish of a child, not to have his mother present, which clearly was not in his best interest? Inspector Coleman's evidence was that up to the time when the JP and teacher arrived at the Brown's Town Police Station, he (Inspector Coleman) was not aware that Mr Robinson intended to give a caution statement. The JP and teacher had, in fact, been called to witness the taking of the caution statement from Mr Newland which was taken just before the one from Mr Robinson.

(l) Why was the teacher not briefed on his role? His evidence, at the *voir dire*, revealed that he saw his role simply as a witness to the actual taking of the caution statement rather than to give advice to or ask questions of the minor.

(m) What about the alleged enquiry, by the JP, of Mr Robinson at the Brown's Town Station, in the presence of Inspector Coleman, as to whether he wanted to talk to the JP in private – would that have been fair?

(n) What should be made of the unresolved conflict between the teacher and the JP as to whether any enquiries were made of Mr Robinson prior to the taking of the caution statement?

[103] Mr Robinson said in his evidence, at the *voir dire*, that he made the caution statement under threat. The alleged threats started on the journey to the Brown's Town Police Station and continued up to when he was being taken into the room to record the caution statement. These alleged threats followed the taking of a witness statement from him at the Watt Town Police Station by Inspector Coleman and another policeman. The allegations of threats were denied. The learned trial judge did consider that evidence.

[104] But leaving that aside, the evidence of the prosecution lacked detail concerning all the time Mr Robinson was in police custody on 1 November 2007, before the taking of the caution statement, despite the evidence that there were several police officers who dealt with him throughout that period. Although we have not been pointed to any specific rule, applicable in this jurisdiction, which requires that a record be kept of all that transpires when a minor (or any suspect) is taken into custody by the police, it is my view that such a record would be useful not only for the protection of suspects but also the police against unfounded allegations. Mr Robinson was known to have been a minor, yet the police did not enquire about his comfort or welfare. Moreover, there was conflict in the evidence as to whether there were any enquiries made of him before he gave the caution statement. Also, the teacher who was supposedly there to see to Mr Robinson's interest did not ask for, nor was he given, any time alone with Mr Robinson.

[105] Furthermore, the evidence of Inspector Coleman was that the teacher and the JP were not called to the police station to witness the caution statement from Mr Robinson. Rather, they were called to witness the caution statement of Mr Newland. They were used in relation to Mr Robinson's caution statement after Mr Robinson declared that he wanted to talk and that his teacher was already present at the police station. It can, therefore, be deduced from Inspector Coleman's evidence that when the teacher and the JP arrived at the Brown's Town Police Station, they knew they were there to witness a statement by Mr Newland but not Mr Robinson. This is significant as it points to a narrow window between the time Mr Robinson would have made the declaration that he intended

to give a caution statement and when it was actually taken. There was no evidence as to what exactly might have been done then, if anything, to seek out duty counsel. On Inspector Coleman's account, he told Mr Robinson that he needed "his lawyer" to be present. Would a 15-year-old be expected to have a lawyer? Would he have understood the importance of having a lawyer present? These were weighty matters for the learned judge's consideration in making a determination as to whether it was fair to admit the caution statement in evidence.

[106] In Jamaica, the Judges' Rules, along with the relevant provisions of the Child Care and Protection Act 2004 ('the CCPA'), embody key requirements to satisfy the standard of fairness if a child is detained by the police. Focusing on direction no 4 of Appendix B of the Judges' Rules, the requirement for the presence of a parent or person in *loco parentis* is qualified by the words, "as far as practicable". These qualifying words admit room for exigencies, but we believe it also means that the child's parent or guardian should be contacted and it is only where it is impracticable to do so or to secure their attendance at the police station, should someone in *loco parentis* be called on. It is not intended that a parent should be ignored and a person in *loco parentis* be preferred, at the whim of a child. This is because the child is less responsible and less mature in his decision-making capacity than an adult and more importantly, protection of the child's interest is paramount.

[107] Clearly, the overriding objective is to protect the child's interest and safeguard his welfare. The purpose of having a parent, or guardian, or other responsible person present (referred to as "the appropriate adult" in the UK) must be to see to the fair treatment of the child who is accused. That is why, as stipulated by direction 4 of the Judges' Rules, the presence of an "appropriate adult" is required even before any information is given to the police in the investigation, by a child. The right to have duty counsel present serves that purpose as well - to protect the wider interests of the accused.

[108] This proposition comports with the decision in **Leroy Rolle**, where the Bahamas Court of Appeal found, on the facts, that the 23-year-old brother of the accused minor was not a person in *loco parentis*. There was no evidence that the brother's role had been explained to him nor was there any evidence that he had an opportunity to communicate with the appellant prior to the statement being recorded. In examining the role of an "appropriate adult", in accordance with the Judges' Rules, the court stated at para. 26:

> "26. We, therefore, urge police officers that to give effect to the spirit and intent of the Judges' Rules they ought to go a step further and explain to the appropriate adult what exactly is his/her role in terms set out hereunder. It is important to note that under the English Code:
>
> > '**The appropriate adult should be informed that he is not expected to act simply as an observer. The purposes of his presence are, first, to advise the person being questioned and to observe whether or not the interview is being conducted properly and fairly; and, secondly, to facilitate communication with the person being interviewed**.'" (Emphasis added)

[109] It does not appear to us that either the teacher or the JP received an explanation as to their roles, or that they had an opportunity to communicate privately with Mr Robinson prior to the caution statement being recorded. The teacher, in giving a description of the circumstances in which the statement was made by Mr Robinson, stated that Mr Robinson was cautioned and his statement written down word for word by Detective Duncan after which the statement was read to him, signed and countersigned. He had been told that Mr Robinson had specifically requested him to witness his statement. He remembered Mr Robinson confirming that he had been asked, "…if they should get a lawyer or his parents" and that he had said, "no".

[110] Under cross-examination, the teacher indicated that neither he nor the JP was allowed any personal time with Mr Robinson before the taking of the statement. He did

not request to do so nor was he told by the police that he could have been afforded such opportunity. He had not heard when Mr Robinson refused to have his mother or a lawyer present. It was "the detective" who told him this had happened. He had no communication with Mr Robinson and made no enquiries of him as to whether he had been threatened, promised anything, physically abused or eaten anything. It is our view that this runs afoul of the very spirit and intent of the Judges' Rules and the standard of fairness.

[111] There is little doubt that in an appropriate case, a trusted teacher might be properly regarded as a person in *loco parentis*. However, it is apparent that in Mr Robinson's case, the teacher did not understand that his role was not that of spectator for purposes of witnessing the caution statement. It is also clearly the case that quite a lot had taken place out of the presence of the teacher, not the least of which was that Mr Robinson had already made statements to the police and indicated that he was minded to give a caution statement. This is the type of scenario which direction no 4 of Appendix B of the Judges' Rules aims to avert - the circumstances where a police officer takes a child to a police station and have conversations with him about an investigation (and takes him to search his home, if that evidence is accurate) without first making all reasonable efforts to secure the presence of the child's parent or one of those persons contemplated in the Judges' Rules. That conduct by the police is wrong. It is a clear violation of the Judges' Rules and ought to be frowned upon. It must also be discouraged. Children are known to be impressionable and do not always act in their best interest.

[112] There were, accordingly, breaches of the Judges' Rules. There was failure to comply with them and the right of Mr Robinson to be treated with the care and attention which is appropriate for a child. The Judges' Rules are based on the principle of fairness which undergirds the investigative and trial processes. The requirements are specific and simple enough for the police to follow. In the first place, the child is to have the protection of a parent or guardian who is present. The child is not capable of waiving these

protections, or as the police said, request that his mother should not be present - a seemingly odd development since Mr Robinson had been taken from his home, when according to him, his mother was there, and later he spoke to her at the Watt Town Police Station about him not being given any attention since being taken there. Also, no effort should be spared in facilitating him with duty counsel (where an attorney-at-law has not been retained on his behalf) to see to the protection of his rights. Additionally, where an appropriate adult is involved, he must be advised of the role he is to play.

[113] The learned trial judge, in her ruling at the *voir dire*, confined her analysis to the circumstances of the actual taking of the caution statement. That was understandable since the prosecution evidence, at the *voir dire*, was substantially about that. But as the authorities have shown, that was too narrow a focus. She needed also to direct her attention to the many questions that were left unanswered and the many issues that remained unresolved by the evidence which was adduced, at the *voir dire*, in support of the proposition that the statement was voluntary and its admission in evidence was fair.

[114] In those circumstances, it is difficult to see how the Crown could maintain its position that Mr Robinson was treated fairly and that the caution statement should have been admitted in evidence

[115] For all the reasons outlined, we are of the view that the caution statement should not have been admitted into evidence. This ground succeeds.

Ground 2 - Having allowed the caution statement to be admitted as evidence, the learned trial judge failed to give adequate warning and directions to the jury, in relation to how to treat with the evidence

[116] Mr Equiano submitted that the learned trial judge recited the evidence concerning the taking of the caution statement, but she failed to alert the jury to the importance of the surrounding circumstances under which the statement was taken, such as Mr Robinson's age, his comfort, the absence of his parent, the lack of private enquires by the JP or teacher prior to the taking of the statement, and the movement of the accused

from one station to the next. Those factors, he argued, affected voluntariness, truthfulness and ultimately the weight the jury might have given to the caution statement. Counsel relied on the authority of **R v Burgess** [1968] 2 QB 112, which, he submitted, outlines the approach to be taken.

[117] In response, Miss Pyke agreed that **R v Burgess** provided a correct exposition on the law, but she disagreed with the characterization of the learned trial judge's treatment of the evidence, referencing aspects of the summation where the directions were considered sufficient for the jury to appreciate the importance of the caution statement and the requirement that it must be voluntarily given for them to attach any weight to it.

[118] In **R v Burgess**, Lord Parker CJ at pages 117 – 188 observed that:

> "…The position now is that the admissibility is a matter for the judge; that it is thereafter unnecessary to leave the same matters to the jury; **but that the jury should be told that what weight they attach to the confession depends on the circumstances in which it was taken, and that it is their right to give such weight to it as they think fit**." (Emphasis added)

[119] This principle was also observed by the Privy Council in **Williams v R**, at para. 21, where their Lordships found that although the judge had told the jury that they must be satisfied that the statement was given voluntarily, "[he] **did not explain with any clarity** their function of determining the weight to be given to the contents of the statement and the relevance of voluntariness to that function" (referencing **R v Mushtaq** [2005] UKHL 25; [2005] 3 All ER 885) (emphasis added). It was explained in **R v Mushtaq**, at para. 3, that:

> "3. The law is clear that where a judge has ruled on a voir dire that a confession is admissible the jury is fully entitled to consider all the circumstances surrounding the making of the confession to decide whether they should place any weight on it, and it is the duty of the trial judge to make this plain to them…"

[120] The Privy Council in **Barry Wizzard v R** (2007) 70 WIR 222, expressed at para. [35] that "[a] *Mushtaq* direction is only required where there is a possibility that the jury may conclude (i) that a statement was made by the defendant, (ii) the statement was true, but (iii) the statement was, or may have been, induced by oppression". In considering the applicability of the "**Mushtaq** direction" to Jamaica, their Lordships ruled, at para. [37], that the principle against self-incrimination is a long-recognised principle of the common law and that the approach in **R v Bass** [1953] 1 QB 680 accorded with that principle. **R v Mushtaq** has re-established the correct approach and is, in consequence, applicable in Jamaica.

[121] The learned trial judge specifically recalled parts of the evidence, pointed out the differences and told the jury that it was for them to resolve. She read the caution statement and reminded the jury of the evidence of the circumstances in which it was taken. She also drew attention to the evidence of DSP Lee, who transported Mr Robinson, and pointed out the differences in evidence between the prosecution witnesses and the unsworn statement of Mr Robinson. She told the jury that they could look at the evidence and see for themselves whether they accepted what the police had to say about what took place in the evening of 1 November 2007. She also reminded the jury that Mr Robinson was saying that he was threatened and that was why he gave the statement.

[122] She recalled the evidence of the teacher and the JP as to the manner in which the statement was taken. She also went through the unsworn statement, and, in particular, pointed out to the jury that Mr Robinson was saying why he did not give the statement voluntarily. The learned trial judge also told the jury that the caution statement could not be used against Mr Robinson unless "it [was] free and voluntarily given". She explained what that meant and that the burden of proof was on the prosecution. She also told them that they had to consider whether it was voluntarily given, and only if satisfied, should they go on to consider what weight to give to it.

[123] Here is what the learned trial judge said at pages 3770 – 3773 of the transcript:

> "Now, I am going to deal with the caution statement of Mr Robinson, ...So whether you call it a confession or caution statement it cannot be used as evidence against an accused person unless it is free and voluntarily given. That is to say, that it must not have been extracted or induce [sic] by any sort of threat, nor obtain [sic] by any promise or favour, nor by the exertions of any improper influence. The burden is on the prosecution to prove that the statement was free and voluntary. In this case, Mr Arthur Robinson, in his unsworn statement, said that he gave the caution statement, Exhibit 1, because Superintendent Bertram Lee, while taking him from Watt Town Police Station to Brown's Town Police Station, on the 1st of November, stopped on this lonely road, held a gun to his head and threatened to kill him if he did not confess to the killing of Mrs Florence Clarke. It is therefore for you, …to decide A, whether or not the statement was made, well Mr Robinson said he made the statement. If yes, was it free and voluntary, so you would have to determine whether it was free and voluntary. If yes, what does the statement mean? Then you will have to consider what weight and what value to be attached to it. …In order that the evidence of the caution statement be admissible, it must be affirmatively proved that such a caution statement was freely and voluntarily given. It should not be proceeded [sic] by any threats, inducement or oppression to the accused to make the statement by any person in authority. The weight and the value of the caution statement is a matter [for] you the jury. If you, the jury, think that Exhibit 1 was done through some threat or inducement, its value would be enormously weakened, the weight and value of the evidence are matters for your determination, so that is it as it relates to Exhibit 1."

[124] The learned trial judge was correct to have reminded the jury that these were relevant circumstances to be considered in their assessment of whether the statement was voluntary. She was also quite right to explain the meaning of "voluntariness" and to instruct the jury that the weight to be attached to the evidence was exclusively for them to decide. However, those directions were inadequate to meet the requirement to clearly explain to the jury that their role was firstly, to determine whether the caution statement was voluntary (and in determining this they had to look at all the circumstances including

what preceded the actual recording of the statement); and secondly, to attach whatever weight they saw fit based on whether they came to the view that the caution statement was given freely and voluntarily. These requirements go to the principle of fairness and the protection of the right against self-incrimination. They would be bald statements if not looked at in the context of all the evidence.

[125] The learned trial judge, therefore, had a duty to assist the jury in identifying, and assessing the evidence of the surrounding circumstances, and to make it plain to them that they were fully entitled to consider all the circumstances surrounding the making of the caution statement to decide whether they should place any weight on it.

[126] It is noteworthy that she made no specific reference to Mr Robinson's age, the absence of any evidence regarding his reasonable comfort, and the absence of his parent when he made the caution statement at the Brown's Town Police Station. She also failed to point to the fact that there were gaps in the evidence as to what transpired for the entire period Mr Robinson was held in custody prior to the taking of the caution statement, particularly at the Brown's Town Police Station where he was held for some four hours. The jury needed to be alerted to this fact, not so that they would speculate about what might have been, but so that they could consider the fact of such gaps in determining what weight to give to the caution statement.

[127] Additionally, the learned trial judge failed to highlight the inconsistencies in the evidence between the teacher and the JP as to whether any enquiries were made of Mr Robinson. Neither did she indicate to the jury what would have been the importance of such enquiries. It was also necessary to alert the jury to the evidence that any enquiry of Mr Robinson would have been made in the presence of the police rather than in private.

[128] For these reasons, this ground succeeds.

Ground 3 – The learned trial judge erred in law by allowing several bits of confession and implied confession statements and acts as evidence without the necessary enquiry and determination of voluntariness and fairness

[129] Mr Equiano submitted that since Mr Robinson was 15 years old at the time of his arrest, it was incumbent on the police authorities to ensure that he was treated fairly and as much as possible, in accordance with the CCPA, which has as its primary objective the protection, safety and well-being of children. He referred to section 67 of the CCPA which provides that:

> "67. – (1) Where a person apparently a child is apprehended, with or without warrant, and cannot be brought forthwith before a court, the officer or sub-officer of police in charge of the police station to which the person is brought shall act in accordance with subsection (2).
>
> (2) The Officer or sub-officer shall –
>
> (a) so inform the government agency responsible for the care and protection of children; and
>
> (b) enquire into the case and may, in accordance with the Bail Act, release the person on a recognizance being entered into by the person or his parent or guardian (with or without sureties) for such amount as will, in the opinion of the officer or sub-officer, secure the person's attendance upon the hearing of the charge, and shall so release that person unless –
>
> (i) the charge is one of murder or other grave crime;
>
> (ii) it is necessary in the person's interest to remove the person from association with any reputed criminal prostitute; or
>
> (iii) the officer or sub-officer has reason to believe that the person's release would defeat the ends of justice.

> (3) Where a person apparently a child is apprehended and is not released under subsection (2), the agency responsible for the care and protection of children shall cause the person to be detained in a juvenile remand centre until the person can be brought before a court."

[130] Counsel recited the circumstances in which Mr Robinson came into police custody and his treatment. He pointed out at least nine occasions where Mr Robinson offered up incriminating evidence without the benefit of legal representation or having a parent or adult present to protect his interest. These included 2 November 2007, when, according to Sergeant Russell's evidence, he took Mr Robinson from the Runaway Bay Police Station to a goat pen at his house as well as to Mrs Clarke's house in search of incriminating evidence; and 7 November 2007, at the Runaway Bay Police Station, where based on Sergeant Duncan's evidence, Mrs Scarlett (the daughter of Mrs Clarke) and Messrs Newland and Robinson were shown a cellular phone and a camera, which Mrs Scarlett identified as belonging to her mother. Mr Newland said "A mi tek it up off the table", to which Mr Robinson said, "Yes sah, a him tek eh up and fling it weh an mi go back up a Missa Clarke yard and find it unda di ackee tree; a Missa Clarke send mi guh up deh". Again, on 7 November 2007, when Mr Robinson was tied up and lowered into a pit latrine at the direction of the police to retrieve implements he had disposed of and after he was hoisted from the latrine, cautioned and asked about the implements he retrieved, he said, "Si di bat yah sah. A dis mi use lick Miss Clarke and si di knife yah, mi use di socks as gloves".

[131] There was no objection to this evidence by counsel for Mr Robinson, at the trial, except to say that a knife blade purported to have been taken from the latrine had no nexus to Mr Robinson. Mr Equiano submitted, however, that the inhumane treatment meted out to Mr Robinson was exposed early in the trial and should have alerted the court to the disregard that the police held for Mr Robinson's health, safety and human rights. Counsel argued that the court having been made aware of such 'callous conduct'

by the police should have guarded Mr Robinson against such words and actions being placed before the jury as the prosecution had not proved to the requisite standard that the words and actions were based on Mr Robinson's free conscience and not duress. The failure to protect him, rendered the trial unfair for reasons including cruelty to a child.

[132] In response, Miss Pyke submitted that when Mr Robinson made the statements, he had been properly cautioned and advised of his rights. Apart from the caution statement, evidence had been elicited in which Mr Robinson indicated that he was sent by Mr Clarke to kill Mrs Clarke, and that he made a bat which was used in the killing and recovered it from the pit. When he was arrested and under caution, Mr Robinson said that he wanted his money, because Mr Clarke had sent him out "and dem arrest him di Saturday". It was submitted that this was ample evidence that Mr Robinson committed the offence.

[133] Miss Pyke also contended that there was no objection to the statements being admitted at the trial and thus it was puzzling that an objection would now be taken on appeal. In the circumstances, she submitted, that the oral statements were properly admitted and this ground should fail.

[134] It is clear to us that there was no evidence that the entity mandated to protect and enforce the rights and best interest of children (the Office of the Children's Advocate), or the agency responsible for the care and protection of children (the Child Development Agency (as it then was), now known as the Child Protection and Family Services Agency) was advised of Mr Robinson's apprehension and detention or the charge brought against him. Further, Detective Sergeant Duncan gave evidence that although they were in a position to charge Mr Robinson, with the murder, from 1 November 2007, they did not charge him until several days later. He did not explain the delay. There was also evidence that Mr Robinson was kept at multiple facilities designated for adults, although there was a juvenile remand facility in the parish.

[135] Mr William Harris, son of Mrs Clarke, had also testified that he assisted the police to tie Mr Robinson with rope around his thighs, back and chest when Mr Robinson was lowered into a pit latrine multiple times at the Watt Town All Age School to retrieve implements he had disposed of. It was his evidence that Mr Robinson wore no protective gear and was barefooted. He surmised that Mr Robinson might have touched the faeces, but said the rope had been restrained "…so he couldn't go deep in it". A wooden post, a small pen knife, and socks were retrieved by Mr Robinson from the pit. He was then washed with a hose.

[136] There was no issue that Mr Robinson made various self-incriminating statements while in the custody of the police and did so under caution. The crux of this ground is the propriety of the caution which was administered to a child. The main thrust of Mr Equiano's argument is that Mr Robinson was cautioned without the presence of his parents or representation from an attorney-at-law, and that there was callousness in the conduct of the police officers as it pertained to his health, safety and human rights.

[137] In **Williams v R**, the Privy Council reiterated that fairness was the criterion for admitting an out of court statement and that the voluntary nature of such a statement was the leading factor when determining fairness. In that case, their Lordships were dealing with a matter which involved a child and the applicability of the administrative directions, located at Appendix B of the Judges' Rules, to children defendants. As indicated earlier, direction no 3 of Appendix B requires that "[r]easonable arrangements should be made for the comfort and refreshment of the person being questioned", and direction no 4 provides that "[a]s far as practicable children (whether suspected of a crime of not) should only be interviewed in the presence of a parent or guardian, or, in their absence a person who is not a police officer and is of the same sex as the child".

[138] The appellant in that case had given a written caution statement in which he implicated himself in a murder. He was 12 years old when the murder occurred (although there seemed to have been a misapprehension at trial that he was 14 years old). A *voir*

dire was held after the trial had begun and evidence had already been led in relation to an oral statement where he said he had participated in the killing under duress. No evidence was called by the prosecution about the time or circumstances of the appellant's arrest, the circumstances in which he was brought to the police station, or about his stay there from sometime in the morning to late afternoon, and what happened when he was in the superintendent's office before he gave the statement. The appellant was not fed during the time he was at the station and he said he had been beaten by the police. No evidence was called from medical examiners or police officers to rebut the allegation that the appellant was beaten. No attempt was made to contact his parents or any adult on his behalf, and he was not advised of the right to speak to an attorney-at-law. The most senior police officers, who were present at the time, gave no evidence. A justice of the peace was called and witnessed the recording of the statement but seemed to have had no interaction or conversation with the appellant. The appellant did not deny making the statement but said he did so for fear of further beating.

[139] In assessing the issue of fairness, the Privy Council, at para. 28 stated:

> "28. Their Lordships will assume for the purposes of consideration of the fairness of admitting the statement that the judge was entitled to hold that no beating or other maltreatment occurred. Nevertheless, even if this is accepted, the circumstances of the appellant's detention and of the taking of the statement were such as to create a significant amount of unfairness to him. Their Lordships cannot conclude that, in all the circumstances of the case, it was fair to admit the statement."

[140] The instant case does bear some similarity to the facts of **Williams v R**. The circumstances endured by Mr Robinson included him being taken from his home by the police; taken to various places; moved from one station to another; questioned by numerous police officers over several days while being in custody; tied up and lowered multiple times into a pit of filth, which was made worse as he had no proper gear or protective clothing and was made a spectacle of; having no parent, other adult or

attorney-at-law to look after his interest; and kept in police custody for days without being charged, at facilities which were designated for adults without any evidence that his well-being was protected.

[141] To borrow the words of their Lordships, the circumstances of his detention and the making of those statements "were such as to create a significant amount of unfairness" to Mr Robinson. The cruelty meted out to Mr Robinson is characteristic of not only a breach of the CCPA and the Judges' Rules, but of his constitutional rights, specifically section 13(3)(h) of the Charter which provides for "the right to equitable and humane treatment by any public authority in the exercise of any function", and section 13(3)(k)(i) which provides for "the right of every child to such measures of protection as are required by virtue of the status of being a minor or as part of the family, society and the State".

[142] The Crown was in its right to point out that there was no objection to the statements at trial. In like manner, it should be pointed out that the learned trial judge had a discretion whether to admit evidence of out of court statements which amounted to a confession by the maker of those statements. The circumstances under which these pieces of evidence were obtained, lend support to Mr Equiano's submissions that the actions of agents of the State were so "callous and inhumane" that those pieces of evidence should not have been admitted into evidence unless it was proved by the prosecution that Mr Robinson was not acting under oppression or duress at the material times.

[143] Mrs Clarke was brutally killed. Her demise was as a result of an evil act which showed a lack of compassion, disregard for human rights and a violation of the law. This cannot in any way be remedied by a lack of human compassion and disregard for the rights of a child who was accused of being involved. In applying the principles of law, the consideration is whether Mr Robinson's out of court statements were voluntary and free from oppression, and in all the circumstances he was treated fairly.

[144] Mr Robinson was not afforded the treatment and protection that should have accorded him as a child, and the circumstances show that the standards of fairness were severely compromised. The learned trial judge failed to give due consideration to the effect of admitting these bits of evidence upon the fairness of the trial. We are, therefore, unable to conclude that it was fair to admit the "several bits of confession and implied confession statements and acts" as evidence.

[145] For these reasons, ground 3 succeeds.

Ground 4 – The learned trial judge erred in law by allowing the police witness statement of Mr Newland to be admitted into evidence as an exhibit and no direction given to the jury on summation could cure this defect

[146] As indicated earlier, Mr Newland pleaded guilty to the murder of Mrs Clarke and was called as a witness for the prosecution at the trial. He, however, testified that he did not know Messrs Robinson and Clarke and that no one accompanied him to murder Mrs Clarke. Neither did he meet up with anyone before the murder. He said he alone was present at the time of the murder and he used a knife in its commission. He also denied giving a caution statement to the police.

[147] Having proved adverse, the prosecution successfully applied to have Mr Newland treated as a hostile witness. He was shown the particular witness statement that he gave to the police implicating Messrs Clarke and Robinson. This statement was read to the jury. He acknowledged his signature to the statement, but denied the contents. He maintained that he did not know Messrs Robinson and Clarke and testified that the first time he heard their names was when he went to court.

[148] Mr Equiano submitted that the learned trial judge erred in law by allowing the witness statement of Mr Newland to be admitted in evidence as an exhibit. He submitted that if a hostile witness, who is cross-examined on a previous inconsistent statement, adopts and confirms some of the contents of the statement, then whatever he says becomes part of his evidence. Subject to the jury's assessment of the hostile witness'

credibility, the evidence is capable of being accepted. However, the admissible evidence is what he says in the witness box and not what he says out of court. In support of this principle, counsel referred to the following statement by Lord Parker CJ in **R v Golder** [1960] 1 WLR 1169 at pages 1172 – 1173:

> "…when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act."

[149] Relying on **R v Maw**, counsel contended that it was insufficient to tell the jury to approach the evidence with great caution and reservation. The judge should also give a clear warning about the dangers involved where a witness contradicts himself, and direct the jury to consider whether they could give any credence to such a witness. It is only if they could give credence to the witness that they may then consider which parts of his evidence could be accepted. Counsel contended that, even so, such directions would hold well only if there was some evidence from Mr Newland that the prosecution could possibly rely on. However, the only statement by Mr Newland that would have been of value to the prosecution was the statement he made out of court, which he did not, in court, admit to making.

[150] Citing **R v Darby** [1989] Crim LR 817, counsel further submitted, as did Miss Burgess, that copies of Mr Newland's witness statement should not have been put before the jury, as the only relevance of the previous inconsistent statement was to discredit Mr Newland. Counsel acknowledged that the prosecution was within its rights to cross-examine on variances that arose between Mr Newland's evidence in court and his previous statement, but questioned the value of placing the particular witness statement before the jury, other than to put before them prejudicial material with the hope that they would be influenced by it. The prejudice outweighed its probative evidential value, he asserted,

and for that reason, Mr Newland's statement should not have been admitted in evidence. That said, the warning given by the learned trial judge, or any warning given in the context, regarding the use of the statement, would not rid the jury's mind of its content.

[151] Counsel also argued that the content of Mr Newland's statement would have tended to negative Mr Robinson's defence and his unsworn statement. So, by putting Mr Newland's statement before the jury, he argued, they were being asked to find that Mr Newland was not truthful in his evidence because on a previous occasion he had given a statement implicating Mr Robinson. That evidence was incriminating and very prejudicial to Mr Robinson and it would have been very difficult for the jury to ignore its content.

[152] In response, Miss Pyke submitted that the principle in **R v Golder** could not be relied on as it was bad law and had been overruled. She contended that the accurate statement of the law is contained in **R v Maw, Kevin Grant v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 161/2004, judgment delivered 10 November 2006, and **Kayvon McPherson v R** (unreported), Court of Appeal Jamaica, Supreme Court Criminal Appeal No 87/2006, judgment delivered 7 April 2006, which acknowledge that a witness is not automatically deemed unreliable as a result of being treated as hostile.

[153] However, she conceded that Mr Newland's statement should not have been put in evidence as it was potentially prejudicial having regard to the implication of the statement, the names mentioned and the plan which was exposed. She also acknowledged that the learned trial judge had the discretion to exclude evidence if it was unduly prejudicial.

[154] We agree with Miss Pyke that the principle extracted by Mr Equiano from **R v Golder** is no longer good law. The current state of the law, on this point, is that a witness who has proved adverse is not automatically deemed unreliable as a result of being

treated as hostile, and it is for the jury to determine whether that witness is credible and reliable in any respect.

[155] The treatment which is to be accorded the evidence of an impeached witness was outlined in **Kevin Grant v R**, at page 5, as follows:

> "The trial judge's directions on how the jury should treat a hostile witness, indicated that he must have had his mind to the directions given in [**R v Maw**]. There, it was held, inter alia:
>
> > 'If the witness, as in this case, chose to adopt and confirm some of the contents of his prior statement then to that extent what he said became part of his evidence and, subject to the jury assessing his credibility and reliability, it was capable of being accepted. The evidence was what he said in the witness box, not what he had said out of court. No significant error was made in this case in relation to that distinction. The judge directed the jury in that respect in relationship to the evidence of H and he did also, near the outset of his summing up, in relation to the evidence of C. However, he later blurred the distinction and tended to sum up on the basis that what was said by C in his statement, from which the judge read extensively, was to be treated as part of the evidence.
> >
> > **If a witness had been treated as hostile, and thereafter given evidence, it was necessary for the jury to consider whether he was a witness who should be treated as creditworthy at all, and they should be clearly directed on that point.** The judge did not direct their attention to that question, nor did it appear he considered it himself. It was of fundamental importance for any tribunal to consider whether a witness who had given conflicting evidence was of any creditworthiness

> at all. **It was not proper to go straight to the stage of considering which parts of the evidence were worthy of acceptance and which were to be rejected. If the judge considered the witness was of sufficient creditworthiness, he should give the jury a clear warning about the dangers involved in a witness who contradicted himself and that they must consider whether they could give any credence to such a witness. Only if they considered that they could, to go on to consider what part of his evidence they could accept.**'" (Emphasis added)

[156] We reiterate that it was important for the learned trial judge to have clearly directed the jury, in the first place, that it was necessary for them to consider whether Mr Newland was a witness who should be treated as creditworthy and whether they could give any credence to such a witness, considering the dangers involved with a witness who contradicted himself. Additionally, the court in **R v Maw** had warned that it was not proper to go straight to the stage of considering which parts of the evidence were worthy of acceptance and which were to be rejected. It was only if the jury considered that they could give any credence to the witness that they should go on to consider what part or parts of his evidence they could accept.

[157] At pages 3776 – 3778 of the transcript, the learned trial judge gave this direction:

> "Now, I will also mention in relation to Mr. Emanuelle [sic] Newland, he was called as a witness by the Prosecution, but he gave evidence which did not support the Prosecution's case. The prosecution was allowed to treat him as a hostile witness, a witness who had in fact changed sides. And cross-examine him to show that he had earlier made statements which are inconsistent with the evidence that he gave before this court.
>
> Now, you will recall that in addition to the evidence he gave before the court, there were two other statements that were

> alleged to have been made by Mr. Newland. Now one was Exhibit 13 and one was Exhibit 16, but as I had indicated, those documents will be shown to you.
>
> Now in relation to Exhibit 13, which was the statement dated the 27th of July 2011, he acknowledged seeing his signature on that document, but he denied what was contained in that statement, he denied the content of that statement. And in relation to Exhibit 16, which was dated the 1st of November, 2007, he denied making that statement and he also denied that he had signed that statement. Now, let me tell you that these earlier statements are not evidence of the truth of their contents, bearing in mind that he has denied making them.
>
> They are put before you by the Prosecution, to throw doubt on the reliability of his evidence here in this court. **You have to decide whether you can accept any part of the evidence which he has given in this court, and if so what part of it. If you decide that there is a serious conflict between the evidence he gave to you and the statement which the Prosecution is saying that he previously made and which he denied, you may think that you should reject his evidence all together and not rely on anything he has said in the witness box, because it goes to his credibility**." (Emphasis added)

[158] It is our observation that the learned trial judge gave a direction to the jury that it was for them to to decide whether they could accept any part of the evidence which Mr Newland gave in court, and if so what part of it. She also gave a direction that it was open to them to reject his evidence all together and not rely on anything he had said in the witness box, because it went to his credibility. Further to the observations made at para. [48] through [49] of this judgment, this direction clearly failed to express to the jury that it was necessary for them to first consider whether Mr Newland was a witness they could give any credence, and that there was a danger involved with a witness who contradicted himself. She also failed to direct the jury that it was only if they considered that they could give credence to Mr Newland that they could go on to consider what part or parts of his evidence they could accept. Instead, the learned trial judge's directions to

the jury went straight to the stage of them considering which parts of Mr Newland's evidence were worthy of acceptance and which were to be rejected, without first considering whether Mr Newland was a witness they could believe.

[159] The directions to the jury also did not deal with the possible prejudicial effect of Mr Newland's witness statement on Messrs Robinson and Clarke. Though the content of the statement was denied by Mr Newland, it remained highly prejudicial to Messrs Robinson and Clarke as it implicated them as being parties to the murder. Hence, greater care was needed in how the directions were crafted to minimize the likely prejudice that could result. Having placed the statement before the jury, the directions by the learned judge were inadequate to mitigate any prejudicial effect which its content might have had on the jury.

[160] That said, the prejudicial effect of admitting Mr Newland's statement clearly outweighed its probative value, considering that the sole value of admitting it in evidence was to discredit him

[161] We, therefore, agree with the submissions of Mr Equiano that the evidence from Mr Newland's statement was incriminating and very prejudicial to Mr Robinson and should not have been placed before the jury. There was no good reason to admit it in evidence, and it would have been difficult for the jury to ignore its content. Its admission further contributed to the trial of Mr Robinson being unfair.

[162] For these reasons, ground 4 succeeds.

Ground 5 – The learned trial judge erred in law by allowing the statement of the absent Assim Straw to be admitted as evidence without the statement satisfying section 31 of the Evidence Act

[163] The prosecution conceded this ground, so, we will only make brief observations.

[164] Detective Sergeant Duncan gave evidence at the trial that he had taken a statement from one, Assim Straw, a schoolmate of Messrs Newland and Robinson. Mr Straw was not present at the trial as the prosecution said he could not be found. This led to the prosecution making an application under section 31D of the Evidence Act, to have Mr Straw's witness statement admitted into evidence. Counsel for Mr Robinson had objected to the application on the bases that it did not disclose sufficient familiarity between the potential witness and Mr Robinson at the material time, and that it fell below the threshold required by section 31D. He also expressed concern that the "Turnbull" safeguards on visual and voice identification were not satisfied. Notwithstanding, the learned trial judge ruled that the issues of identification could be cured by appropriate warnings and "Turnbull directions" to the jury and granted the application for Mr Straw's witness statement to be admitted in evidence.

[165] The evidence contained in Mr Straw's witness statement was that in the latter part of September 2007, he had heard Messrs Newland and Robinson discussing a plan to rob "Miss Fed" because "she have money" and they "want a car fi December fi rent fi go sport". They were also alleged to have said, "We have fi throw liquor down her throat and stab her up". It was not established who Miss Fed was or what connection, if any, she had with this case.

[166] Section 31D of the Evidence Act states:

> "31D. Subject to section 31G, a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person –
>
> (a) is dead;
>
> (b) is unfit, by reason of his bodily or mental condition, to attend as a witness;

(c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;

(d) cannot be found after all reasonable steps have been taken to find him; or

(e) is kept away from the proceedings by threats of bodily hard and no reasonable steps can be taken to protect the person.

[167] These requirements must be strictly proven. The evidence adduced by the prosecution should show that pertinent, reasonable and timely effort had been made to ascertain the whereabouts of the witness, having regard to all the information which was known about him (see **Brian Rankin and Carl McHargh v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 72 & 73/2004, judgment delivered 28 July 2006 ('**Brian Rankin**'); and **Carlington Tate v R** [2013] JMCA Crim 16).

[168] Mr Equiano submitted that there was no evidence to support conditions (a), (b), (c) or (e) of section 31D of the Evidence Act. As for condition (d), he argued that no evidence was led as to the efforts made to locate Mr Straw, or even if he was informed of the trial date. The only evidence was that he was not present.

[169] Miss Pyke agreed that evidence ought to have been adduced to satisfy the court as to what reasonable steps were taken to secure the witness, but this was not done. Citing the authorities of **Brian Rankin** and **Carlington Tate v R**, she accepted that enquiries surrounding the location or whereabouts of the witness in question must be pertinent, reasonable and timely, and that checks must be made regarding all information known about the witness in order to meet the standard. She also, importantly, noted that the burden of proof is on the party seeking to adduce the evidence. Where the prosecution is seeking to admit a statement pursuant to section 31D, it must satisfy the court beyond a reasonable doubt, whereas the defence would do so on a balance of probabilities. Having regard to the circumstances and the cases, counsel conceded that the provisions of the section 31D were not strictly met by the prosecution. She also

acknowledged that neither was it agreed by the parties that the witness statement was to be tendered in evidence and so section 31C of the Evidence Act could not operate to make the statement admissible.

[170] Not much had been done to locate Assim Straw and secure his attendance at court. There was also no evidence in support of conditions (a), (b), (c), and (e). Accordingly, the learned trial judge erred when she granted the application for Mr Straw's witness statement to be admitted in evidence as the requirements of section 31D of the Evidence Act were not strictly proved, nor was the admission of the witness statement agreed. We agree that the hearsay statement of Mr Straw should not have been admitted and its admission had the effect of depriving Mr Robinson of a fair trial.

[171] For these reasons, ground 5 succeeds.

Ground 6 – The learned trial judge misdirected the jury on the facts by saying that Mr Robinson said that he assisted Mr Clarke to dispose of the items that were used in the commission of the offence

[172] Mr Robinson said, in his unsworn statement from the dock, that he had just completed the task of packing away cylinders for Mr Clarke and was waiting for "a small change", on the date Mrs Clarke was injured, when he heard Mrs Clarke arguing with Mr Clarke that his girlfriend had attacked her in Brown's Town. He then heard Mrs Clarke say, "Tony" and something smashed. He said Mr Clarke then called him and told him to dispose of some things. He refused and Mr Clarke "draped him up", shoved a sharp instrument into his side and threatened to kill him and his family if he spoke about the incident. He then took the baton and other things from Mr Clarke and left. He eventually threw them into the pit toilet.

[173] The contention in this ground pertains to the following extract of the summation at pages 3784 – 3786 of the transcript where the learned trial judge directed the jury as follows:

> "If having considered all the evidence in the case you are not satisfied to the extent that you feel sure that Arthur Robinson was a part of a joint plant [sic], or agreement to kill Mrs. Floris Clarke, then you would have to return a verdict of not guilty against him for the offence of murder. You would then have to go on to consider whether or not he was, what is known as an accessory after the fact. This is a person who knowing that a serious crime has been committed either comforts, perceives or assist the person who committed the crime. To make a personal [sic] accessory, the assistance must be given to the person committing the crime personally in order to prevent or hinder that person from being apprehended, or try [sic], or suffering punishment, or to escape arrest, or conviction. This offence is committed only if the accused has one of its objects, the assistance of the person who committed the crime to a void [sic] apprehension. There must be the following elements: There must be knowledge that a serious crime was committed. There must be an active step to assist the person who committed the crime, and thirdly, that the assistance was given for the purpose noted or intention of hindering the arrest or prosecution of the person committing the crime. In other words, Madame Foreman and Members of the Jury, if you find that the object was to assist Mr. Bertram Clarke to escape arrest by disposing of the items that may have been used in the commission of this crime, then it would be open to you to convict Mr. Arthur Robinson of being an accessory after the fact. **Because he is saying that he did not take part in any plan, or any agreement to kill Mrs. Floris Clarke, all he did was to assist Mr. Clarke to dispose of the items that were used in the commission of the offence.** And you will recall he was the one who had taken the police and Mr. Harris to retrieve those articles which are in evidence from the pit latrine at the Watt Town All Age School." (Emphasis added)

[174] Mr Equiano complained that the learned trial judge's statement that Mr Robinson was saying that all he did was to "assist Mr Clarke to dispose of the items that were used in the commission of the offence" amounted to a misdirection. Counsel argued that at no time in his unsworn statement did Mr Robinson state that the objects he disposed of were used in the commission of the crime. What he stated was that he was given the objects

to dispose of under threat, and at no time alluded to knowing that a crime was committed and that he was being asked to dispose of objects used in the commission of a crime. Counsel submitted that Mr Robinson's case was, therefore, erroneously placed before the jury and the fact that it came so close to the end of the summation, seriously eroded Mr Robinson's chance of an acquittal and affected the fairness of his trial.

[175] Miss Pyke acknowledged that a misstatement of the facts of the case can be a material irregularity, depending on the nature of the error, the nature of the evidence generally and the issues in the case. It was her submission, nevertheless, that where a judge misquotes the evidence, a conviction should not be disturbed "if a reasonable jury, properly directed would nonetheless have convicted". In support of this submission, she referred us to the authority of **Norick Brooks v R** [2014] JMCA Crim 20 where, at para. [20], submissions were advanced in reliance on the case of **Rupert Anderson v R** (unreported), Privy Council No 51 of 1970, from the Court of Appeal of Jamaica, judgment delivered 13 July 1971.

[176] Counsel, however, disagreed that the statement by the learned trial judge was a mistake of fact, and suggested that what the learned trial judge did in her direction to the jury was to merge the evidence from the prosecution witnesses with the out of court statements and the unsworn statement made by Mr Robinson, with regard to items disposed of. By so doing, counsel posited, the learned trial judge had usurped the function of the jury by drawing a conclusion which was for them to make if they found the particular facts proven.

[177] We wish to state that the case of **Norick Brooks v R** does not assist the Crown. The decision of this court, in that case, was that the proposition in **Rupert Anderson v R** would not apply if the defence's case had not been fairly put to the jury. This was expressed at para. [24] of the judgment where Brooks JA (as he then was) stated:

> "[24] It cannot be said that Mr Brooks' case received fair consideration. In those circumstances, the fairness of the trial was compromised. The question as to whether the learned trial judge would have convicted Mr Brooks even if he had properly understood the case for the defence cannot be definitely answered in the affirmative. This is a different situation from that in a case such as **Rupert Anderson v R**, where a misquoting of a portion of the prosecution's case results in the strengthening of the prosecution's case. The difference is that, in this case, the defence's case has not been fairly put to the tribunal of fact."

[178] We agree with Mr Equiano that at no time did Mr Robinson state that the objects he disposed of were used to commit the crime. This blunder resulted in Mr Robinson's defence having not been fairly put before the jury. Not only was Mr Robinson's defence not properly placed before the jury, but the learned trial judge also directed them on an alternative offence of accessory after the fact which did not arise on the evidence, was not charged in the indictment, and was not an offence that could have been left to the jury on a charge of murder. As a matter of law, that offence cannot be left to a jury without it having been charged in the indictment; it is not a lesser offence to murder (see generally, section 36 of the Criminal Justice (Administration) Act).

[179] This is not a case in which it could be said that the outcome was inevitable and the learned trial judge's remarks would have had no effect on it. The direction given to the jury had the risk of planting in the jury's mind that Mr Robinson had knowledge that the items for disposal had been used to commit the murder of Mrs Clarke. In outlining Mr Robinson's defence in that way, the learned trial judge compromised his case. We cannot, therefore, say that Mr Robinson's case received fair consideration.

[180] For these reasons ground 6 also succeeds.

[181] We have seen that Mr Clarke has succeeded on the substantial grounds advanced for leave to appeal his conviction and Mr Robinson has succeeded on all grounds advanced, on his behalf, in his appeal. Notwithstanding, there remains the question of

whether there was substantial miscarriage of justice to justify allowing either appeal. This will be considered next.

Application of the proviso in section 14(1) of the JAJA

[182] Section 14(1) of the JAJA states:

> "14. – (1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> **Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred**. (Emphasis added)

[183] Accordingly, even where the outcome of a point on appeal favours the appellant, the proviso under section 14(1) of the JAJA empowers the court to dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

[184] Miss Burgess argued that application of the proviso, in the case of Mr Clarke, would not be justified. She contended that the relatives of Mrs Clarke gave evidence of what they considered to be suspicious activities by Mr Clarke and the impact of his extra marital relationship on the marriage, but they gave no evidence of a murder pact involving Messrs Clarke, Robinson and Newland, which was the plank on which the prosecution built its case. Apart from this, there was no admissible evidence against Mr Clarke as one alleged accomplice had recanted his statement and the other altered his statement at the trial.

[185] In response, Miss Pyke argued that there was credible evidence against Mr Clarke even in the absence of Mr Newland's statement. The evidence against him consisted of a series of circumstances which, when evaluated together, presented facts on which a jury could draw the inference that he was a party to the murder of Mrs Clarke. Most telling was the evidence of his conduct at the house after he allegedly came home to find his wife injured and also at the hospital. Counsel submitted that there was ample evidence for the jury to convict Mr Clarke, when looking at the series of 'undesigned coincidences' and his general statements about the burglaries, and that "if Mrs Clarke will be able to talk, that will be a problem".

[186] We have already found that admission of certain pieces of evidence and certain directions to the jury, by the learned trial judge, resulted in an unfair trial for the appellants. In Mr Robinson's case, the learned trial judge misdirected the jury on the use that could be put to Mr Robinson's unsworn statement and the out of court statements made by him. Specifically, she failed to tell the jury that Mr Robinson's unsworn statement and the various out of court statements which he made, could not be used against Mr Clarke. She also failed to give adequate and appropriate directions in relation to the witness statements of Mr Newland. These errors resulted in significant unfairness and prejudice to Mr Clarke. They also had the effect of compromising his defence, exposing him to adverse findings by the jury and prejudicing his chances of an acquittal.

[187] If the inadmissible evidence had been excluded, then the prosecution would only be left with the evidence of the family members and acquaintances. Such 'circumstantial evidence', which was largely speculative, might have revealed a husband who displayed a lack of affection, respect, attention, care and commitment to his wife, but those are not the ingredients of murder or a pact to commit murder and a jury, properly directed, would be unlikely to convict on that evidence. In the circumstances, it cannot be said that a substantial miscarriage of justice did not result.

[188] As regards Mr Robinson, Mr Equiano posited that whereas this court may hold that a particular ground of appeal would not be sufficient, to render the trial unfair, the cumulative effect of the deficiencies would strongly suggest that Mr Robinson did not receive a fair trial. Counsel stopped short of saying that the proviso should not be applied.

[189] By contrast, Miss Pyke's submissions were in favour of this court applying the proviso. She contended that the prosecution presented a cogent and coherent case against Mr Robinson, by his own admissions, his oral statements including the statement to Detective Sergeant Duncan when he was arrested, the fact that he was able to recover the items used in the murder and his unsworn statement where he placed himself at the house of Mrs Clarke on the night she was injured. So, even if the statements of Messrs Assim Straw and Newland had not been admitted, there would have been overwhelming evidence to support a conviction and the jury would have inevitably returned a verdict of guilty.

[190] We have already said that Mr Robinson was not accorded a fair treatment. His caution statement and out of court statements were given in circumstances where he was not represented by a lawyer or had the benefit of a parent or a person who performed the role of '*loco parentis*' in protection of his welfare. He had been in custody for several days without charge during which time he was questioned by several police officers in different locations and mistreated during his period of detention (unfed for several hours and lowered multiple times, into a pit latrine, without any protective gear). Additionally, there was no evidence, at the trial, of the surrounding circumstances which led to the making of the caution statement, and there was conflicting evidence as to whether enquiries were made of Mr Robinson, in relation to the making of his caution statement. The fact that he was a minor was, in the main, either ignored or exploited by the police and this resulted in several breaches of the law, and the rights accorded Mr Robinson under the Constitution. These breaches resulted in his case not having been fairly placed before the jury.

[191] Without the impugned material, the case against Messrs Clarke and Robinson was negligible. The cumulative effect of the procedural errors and other weaknesses in the prosecution's case, particularly evident in the absence of any credible evidence about the pact or the murder itself, amounted to a trial which was unfair and convictions that were unsafe. To apply the proviso would result in a serious miscarriage of justice, with respect to both men.

[192] For all the reasons outlined, we do not consider this an appropriate case for the application of the proviso under section 14(1) of the JAJA.

[193] These were not mere technical blunders. The deficiencies and errors went to the heart of the prosecution's case and the safety of the convictions. As regards both appellants, the evidence on which the Crown sought to rely was largely inadmissible for various reasons, not least of which was the significant amount of unfairness and prejudice. There were clear breaches of the appellants' fundamental rights to a fair hearing which are fatal to their convictions.

[194] Accordingly, we find that the application for leave to appeal should be granted and the appeals allowed. But this is not the end of the matter. The next question is whether there should be a retrial or a verdict or judgment of acquittal.

Whether a new trial should be ordered

[195] Section 14(2) of the JAJA provides that:

> "14. – (2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit.

[196] Miss Burgess submitted that there should not be a retrial. Counsel indicated that at the time of the hearing of the appeal, Mr Clarke was 70 years old and that he had already served four and a half years of the sentence. She also submitted that there had been substantial delay in conducting the trial as the offence took place in 2007 but the trial did not commence until 2015. Counsel argued that in all the circumstances, the trial of Mr Clarke was unfair and no retrial should be ordered.

[197] Mr Equiano contended that a retrial could not correct the deficiencies in the case against Mr Robinson. The treatment of Mr Robinson, he argued, cannot be reversed as the occurrences were mainly at the investigative stage.

[198] Miss Pyke submitted that if the court were not minded to apply the proviso, then a retrial would be appropriate having regard to all the circumstances and the well-established principles. She argued that the interests of justice would be best served, in light of the seriousness of the offence and the fact that the prosecution did not have any evidential hurdles in relation to the appellants. It is also in the interests of justice that a final verdict be by a jury. She further submitted that to order a retrial would not amount to giving the prosecution a second chance to cure evidential difficulties, as the prosecution at all times had a very strong case against both appellants, on which a jury properly directed could convict.

[199] Counsel also asked the court to consider that the evidence had not depreciated with the passage of time and all the prosecution witnesses were available. Moreover, the defences raised by Messrs Clarke and Robinson had not been affected by the passage of time and the nature of the evidence was such that any change would enure to each of them.

[200] In **Dennis Reid v R** [1979] 2 WLR 221, the Privy Council provided guidance for determining whether a retrial should be ordered pursuant to section 14(2) of the JAJA. At pages 226 to 227, the Board stated:

"Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury. Save in circumstances so exceptional that their Lordships cannot readily envisage them it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the defendant. At the other extreme, where the evidence against the defendant at the trial was so strong that any reasonable jury if properly directed would have convicted the defendant, prima facie the more appropriate course is to apply the proviso to section 14 (1) and dismiss the appeal instead of incurring the expense and inconvenience to witnesses and jurors which would be involved in another trial.

In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor: so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless, there may be cases where evidence which

> tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.

[201] We have considered the seriousness and the prevalence of the offence for which the appellants were charged but we see no compelling reason to order a retrial. In the case of Mr Clarke, the inadmissible evidence as regards the unsworn statement and out of court statements formed the substantial part of the evidence against him. Without the inadmissible evidence and that of Mr Newland (a hostile witness), the prosecution would be left only with the 'circumstantial evidence', which in our view, would be insufficient to mount a successful prosecution. As regards Mr Robinson, the unfairness and level of cruelty meted out to him at the investigative stage cannot be reversed or remedied by a new trial.

[202] Therefore, when the residue of admissible evidence is considered, together with how much time has elapsed since the incident in 2007, the time Messrs Clarke and Robinson have spent in custody, and the stance of the confessed killer, Mr Newland, that they were not involved in the killing of Mrs Clarke, we have concluded that a retrial would not be appropriate.

[203] In light of all that we have said, we hereby order as follows:

(1) Bertram Clarke's application for permission to appeal is granted.

(2) The hearing of the application for permission to appeal is treated as the hearing of the appeal and the appeal is allowed.

(3) Arthur Robinson's appeal is allowed.

(4) The convictions of both appellants are quashed, the sentences set aside, and verdicts and judgments of acquittal entered in their stead.